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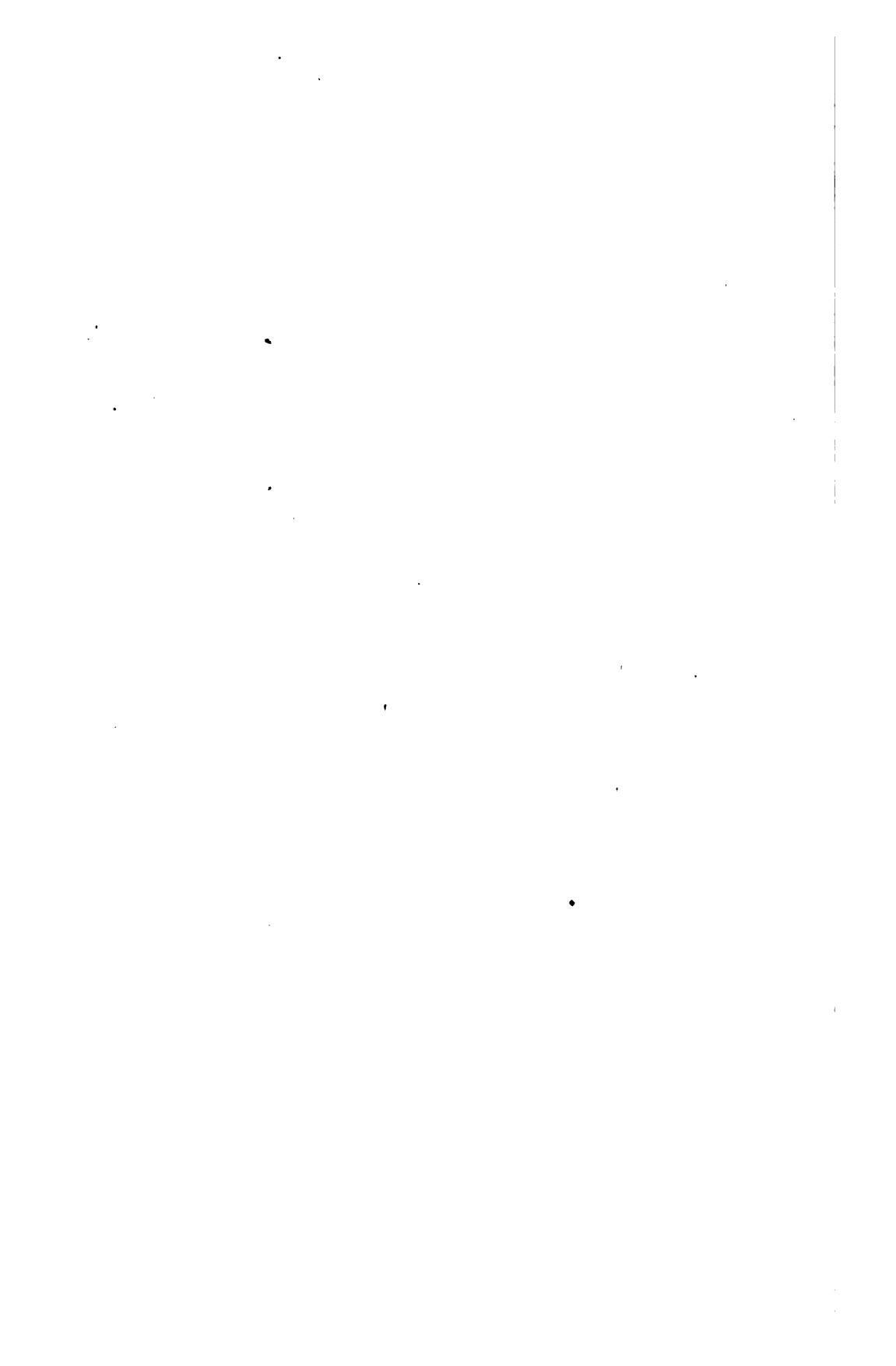
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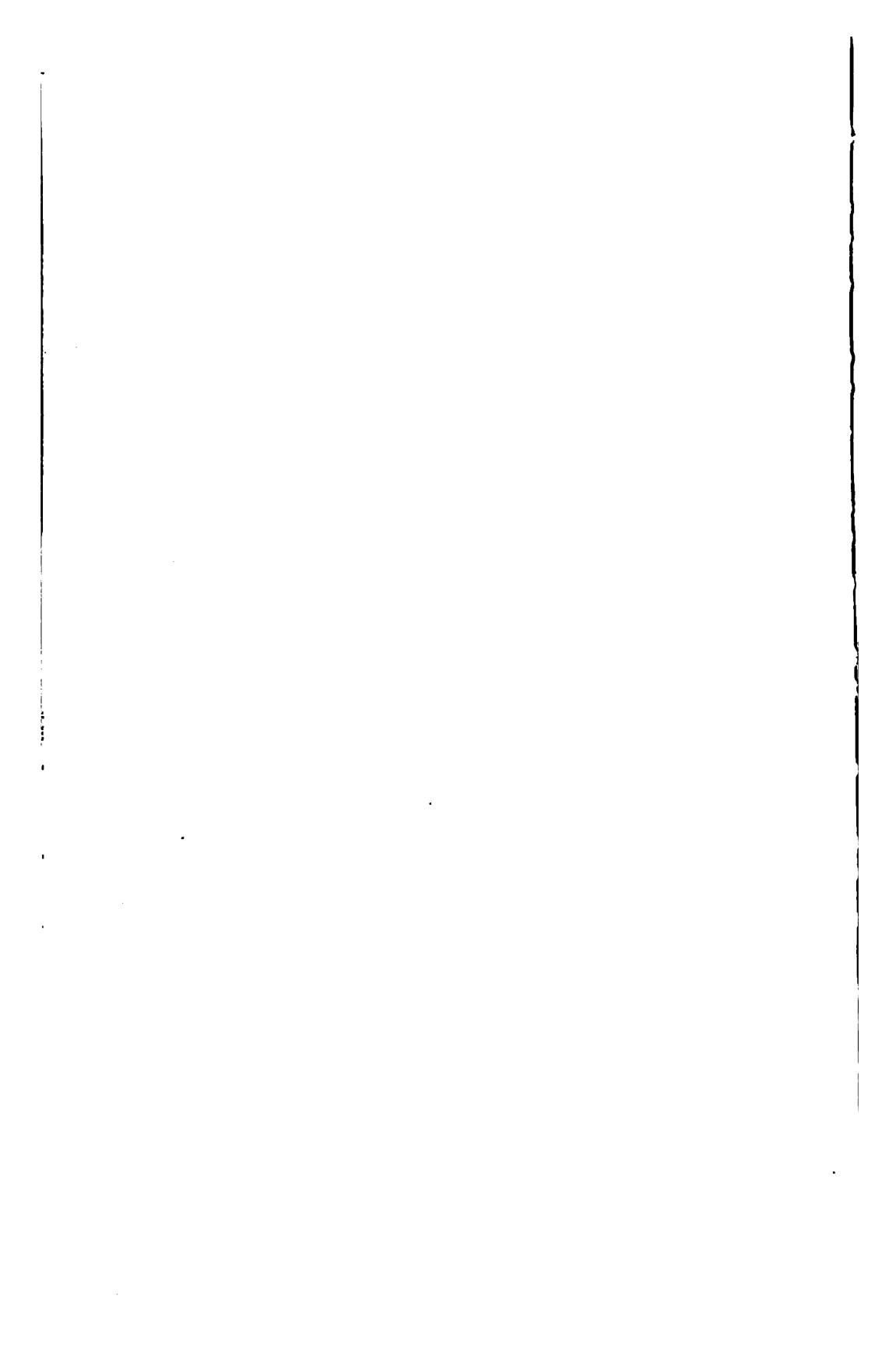
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HANDBOOK

OF THE LAW OF

BILLS AND NOTES

BY

CHARLES P. NORTON

LECTURER ON BILLS AND NOTES IN THE BUFFALO LAW SCHOOL

FOURTH EDITION

WITH AN APPENDIX CONTAINING THE NEGOTIABLE
INSTRUMENTS LAW

By WM. UNDERHILL MOORE

PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL

AND

HAROLD M. WILKIE

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PREFACE TO FOURTH EDITION

THE plan of the editors in the preparation of this edition has been, without rewriting the book, so to supplement the third edition as to exhibit the Uniform Negotiable Instruments Law as the most important authoritative statement of the law of negotiable bills and notes in the United States. The act has been cited, whenever applicable, and the effect of its provisions, when necessary, discussed in the notes. An attempt has been made to cite all of the cases decided under the act which were reported before April 1, 1914. The Commissioners' draft of the act is printed in the Appendix, and appended to each section is a reference to the pages of the text where the section is cited or discussed. A list of the states, territories, and possessions of the United States in which the act is in force, and a table of the section numbering, in the jurisdictions which have adopted the act, of the corresponding sections, are also printed in the Appendix.

The ninth chapter has been almost entirely rewritten, a few changes have been made in the text of the other chapters, new cases have been added to the notes, many notes have been rewritten, and many new notes have been added. But in view of the character of the book, there seems to be no sufficient reason for indicating, where they occur, these variations from, and additions to, the third edition. The cases cited in the notes carried over from the third edition have not been examined.

The initials N. I. L. and B. E. A. are abbreviations, respectively, for the Uniform Negotiable Instruments Law and the English Bills of Exchange Act. The appearance after the citation of a case of either of these abbreviations indicates that the case was decided in a jurisdiction in which the statute whose title is abbreviated was in force. In referring to the N. I. L., the section numbering of the Commissioners' draft printed in the Appendix is employed. The table of corresponding sections will show the number of the corresponding section in any jurisdiction where the N. I. L. is in force.

W. U. M.
H. M. W.

PREFACE TO THIRD EDITION

IN PREPARING a new edition of Mr. Norton's book, it has been deemed advisable to print as an appendix the Negotiable Instruments Law, which has already been adopted in fifteen states, as well as in the District of Columbia. It is obvious that even an elementary book upon Bills and Notes must contain references to this law, which, while it is, in the main, declaratory in its effect, settles some doubtful points, and necessarily changes rules in many jurisdictions upon points concerning which a conflict of laws existed. The text of the law as printed in the Appendix is that of the New York act, such few modifications as have been made by the various states being mentioned in the notes. The law is also valuable to the student, even in states which have not adopted it, as furnishing a concise statement of rules, which for the most part are of universal application; and for this reason the editor has throughout the book, in the footnotes, inserted references to the appropriate sections of the law, at the same time pointing out any changes effected by them. Much new matter has been incorporated, and this has necessitated some alteration of the former text.

At the suggestion of many teachers, the publishers have adopted the device of printing in bold type in the footnotes and text the names of all cases there cited which are to be found in certain of the collections of leading and illustrative cases on Bills and Notes in use in the law schools. The cases so printed are to be found in Ames' Cases on the Law of Bills and Notes, Huffcut's Negotiable Instruments, and Johnson's Elements of the Law of Negotiable Contracts (second edition).

The present editor wishes to express his great obligation to Prof. Ames, whose Index and Summary at the end of the cases, unquestionably the most important contribution to the subject that has been made in America, he has constantly consulted; and to Prof. Huffcut, whose Negotiable Instruments is an invaluable commentary upon the Negotiable Instruments Law.

FRANCIS B. TIFFANY.

St. Paul, August 31, 1900.

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HANDBOOK
OR
NEGOTIABLE BILLS AND NOTES
FOURTH EDITION

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- 1. Origin of Negotiability.
- 2-7. Distinction between Assignability and Negotiability.
- 8-9. Words of Negotiability.
- 10. Negotiable Bonds.
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ORIGIN OF NEGOTIABILITY

- 1. The negotiability of bills of exchange and promissory notes originated in the custom of merchants. The statute of Anne, which was declaratory of mercantile custom, established the negotiability of promissory notes payable to order or bearer.

The custom of merchants means a body of usages and rules relating to trade, which grew up among merchants, and were enforced as law by the courts. In English law it is as old as Magna Charta, and it is recognized in the stat-

utes of the Plantagenets and the Tudors,¹ though its substantial adoption into the law took place much later.² Orig-

¹ Magna Charta, c. 30; Acton Burnel de Mercatoribus, 11 Edw. I; Statute of Merchants, 13 Edw. I. See, also, 27 Edw. III, cc. 19, 20. See, also, 13 Edw. VI, c. 10, 34 Hen. VIII, cited in Brown, Abr. tit. "Customs," p. 59.

² It seems more accurate to say that the customs of merchants never became a part of the common law, but have been and still are recognized and enforced by the courts which administer the common law. The customs of merchants are a source of law separate from the two well-recognized sources, the common law of England and statutes. That the customs of merchants are thus an independent source of law is obscured by the practice which now prevails in England and the United States of applying all the law to all classes, by one system of courts. There was a time, however, when all controversies were not decided by the courts of the sovereign. Not only were there special local courts for the manors, the towns and the cities, but there were special courts of the merchants in which disputes between members of that class were heard and determined according to the practices and rules which the merchants were accustomed to follow. Just when these courts of the merchants had their beginning is not known. But it is certain that "as early as the twelfth century in Italy, France, Spain, and Germany, and, in fact, wherever commerce flourished, special courts existed for the trial of mercantile cases." Introduction to Smith's Mercantile Law (11th Ed.) lxxv. There were probably two principal reasons for the existence of these courts: (1) The merchants, in the Middle Ages, were a class sharply distinct from the rest of the community. Trade and commerce was the occupation of but few. In England the business of trading was learned from foreigners. These foreign merchants were accustomed to follow certain practices in dealing with each other; practices which, in the case of the Lombard merchants, had determined a considerable part of the civil and maritime law. Much of the trading at that time was done in great fairs, which were held on the continent and in England. Many of the merchant courts were held at these fairs to settle differences arising there. Holdsworth, 1 Anglo-Am. Leg. Essays, 289, 298. Merchant courts were also held in the important trading towns. The merchant courts in the Staple Towns (towns designated by the sovereign for trade in particular articles of commerce) were called Courts of the Staple. Id. 302. The unity of the merchant class supplied the body of custom and also caused the reluctance of the merchants to submit to different rules applied by the courts of different sovereigns. The great prejudice of the subjects of the English sovereign against foreign merchants made it seem necessary that the merchants have their own courts in order to have fair trials. (2) The power to administer justice was in the

inally it distinguished the contracts of foreign merchants from the contracts of ordinary individuals, construing them

hands of the sovereign, who could grant the right to the lords of the manors or to the merchants directly. The right to hold fairs was granted in this way, the necessity for the grant arising from the laws against the admission of foreign merchants. It was to the sovereign's interest to encourage trade and commerce, but at the same time to keep it confined to a few centers of trade. The former was a ready source of additional royal revenue; the latter made it much easier to collect such revenue and made the introduction of foreign trading more gradual. The least expensive inducement that the king could offer to the merchants was the privilege of having their causes tried in their own courts. See Coke, 4 Inst. 272; 3 Blackstone's Com. 33; 27 Edw. III, St. 2 (1353) ch. 2; Malynes' Lex Mercatoria, Part III, ch. xvi, p. 300. The latter purpose was shown in the chartering by the crown of certain towns as "Staple Towns," with a right to hold a court to determine mercantile disputes. The origin and jurisdiction of these courts of the fairs and "of the staple" have been the subjects of several able essays. Brodhurst, The Merchants of the Staple, L. Q. R. xvii, 56, 76; 3 Anglo-Am. Leg. Essays, 16-33; Chas. Gross, Introduction to Select Cases Concerning the Law Merchant, Publications of Seldon Society, vol. 23, p. xvi; A. T. Carter, Early History of the Law Merchant in England, 17 L. Q. R. 122; Scrutton, The Elements of Mercantile Law; Burdick, Contributions of the Law Merchant to the Common Law, 2 Col. L. R. 470-485. But the rapid increase in the number of English merchants, the decline of the guild merchant, and the constantly increasing strength of the crown, and, therefore, of the common-law courts, gradually resulted in the decision of mercantile, as well as other, causes by the common-law courts. The eagerness of the common-law courts, headed by Lord Coke, to cut off the jurisdiction of the admiralty courts in any except strictly maritime causes, hastened the assumption, by the common-law courts, of jurisdiction in these commercial cases. Holdsworth, 3 Anglo-Am. Leg. Essays, 308-21, 319. But this assumption of jurisdiction by the common-law courts did not immediately make the customs of the merchants applicable as rules of conduct to all persons. Says Scrutton, Elements of Mercantile Law, III: "You had to show yourself to be a merchant before you got into the mercantile court; and, until about two hundred years ago it was still necessary to show yourself to be a merchant in the common-law courts before you could get the benefit of the law merchant." Moreover, for a long time mercantile causes were decided in the common-law courts, by special juries of merchants. "It was the habit to leave the custom and the facts to the jury without any directions in point of law, with the result that the cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the

not according to the principles of the common law, but according to the usages of trade.* This custom of regulating

custom from the facts." Scrutton, Elements of the Law Merchant, IV. The customs of merchants, in accordance with which the cases were decided, were not reduced to a definite body of written rules recognized and enforced by the courts. "A great step was gained when, in Lord Mansfield's time, the practice was commenced of leaving merely the facts to the jury while the judge applied the law to their findings." Aske, Customs and Usages of Trade, 20, 21. When special juries had repeatedly found that a certain custom or practice existed, the court could take judicial notice of such custom or practice. It has been said that when such a custom becomes thus established evidence will not be received to show any custom at variance with it. Aske, Customs and Usages of Trade, 30; Edie v. East India Co., 2 Burr. 1216. There is also authority for the view that, when the administration of the law merchant was taken over by the Court of Chancery and the common-law courts, the customs of the merchants became a part of the common law; that from that time on the law merchant, just as any other part of the common law, could not be directly modified by new practices, however universal. Crouch v. Credit Foncier, L. R. 8 Q. B. 374; Bosanquet, The Law Merchant and Transferable Debentures, 15 L. Q. R. 130; Jackson v. York & C. Ry. Co., 48 Me. 147; Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9, semble; First Nat. Bank of Wymore v. Miller, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499; Gregg v. Beane, 69 Vt. 22, 37 Atl. 248; Edmisten v. Henry Herpolzheimer Co., 86 Neb. 94, 92 N. W. 138, 59 L. R. A. 934. But the better view seems to be (and it is now supported by the weight of authority) that mercantile customs are still a distinct source of law, provable by the testimony of merchants, enforced by the same courts which administer the common and statute law. As the customs of merchants change the law merchant changes, except so far as it has been fixed by statute, for example, by the Negotiable Instruments Law. Goodwin v. Roberts, L. R. 10 Ex. 346, 352, affirmed 1 App. Cas. 476 (by some of the justices on a different ground); Rumball v. Metropolitan Bank, 2 Q. B. D. 194; Bechuanaland Co. v. London Trading Bank, [1898] 2 Q. B. 658; Edelstein v. Schuler, [1902] 2 K. B. 144. In the case last cited it was held that debentures according to which payment was subject to several conditions were made negotiable by recent custom among the dealers in such securities. This view is the only explanation for the negotiability of sealed bonds payable to order or bearer. Ordinary sealed notes have, in the absence of statute (see N. I. L. § 6 [subd. 4]) been held non-negotiable, although payable to order or bear-

* Co. Litt. 182; 2 Inst. 404; Vanheath v. Turner (Mich. Term) Winch, 24.

dealings between native and foreign merchants was extended to dealings between native merchants, but was confined to the persons of merchants, as apart from those pursuing other vocations.⁴ It was not until 1666 that courts declared that "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant."⁵

er. Clark v. Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256; Parkinson v. McKim, 1 Pin. (Wis.) 214. In Fairbanks v. Sargent, 39 Hun (N. Y.) 588, 593, the court, in holding that the sealed coupon bond of an *individual*, payable to one Gray or bearer, was negotiable, said, in answer to the argument that at common law a seal deprives bill or note of its negotiable character: "But since bonds of this kind have entered so largely into the financial and business transactions of the country, a more enlarged rule than that previously supposed to be applicable has been adopted for their disposition and the protection of persons receiving them in good faith and for value." It would seem, therefore, in the absence of statute, that an instrument not containing words of negotiability can become negotiable by custom. Smith v. Clark County, 54 Mo. 58. See Myers v. York & C. Ry. Co., 43 Me. 232; Jackson v. York & C. Ry. Co., 48 Me. 147; Augusta Bank v. City of Augusta, 49 Me. 507; Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9; Jones, Corporate Bonds & Mortgages, §§ 185, 242. Compare Partridge v. Bank of England, 9 Q. B. 396; Webb v. Alexandria Water Co., 21 T. L. R. 572. See F. B. Palmer, *The Negotiability of Debentures Payable to Bearer*, 15 L. Q. R. 245-258. Unfortunately the Negotiable Instruments Law seems in many respects to prevent any change in the law merchant by the formation of new mercantile practices. The act applies not only to bills and notes, but to all negotiable instruments, including corporate bonds. N. I. L. §§ 1, 6 (subd. 4), 65, 191; Borough of Montvale v. People's Bank, 74 N. J. Law, 484, 67 Atl. 67; Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108. In Strickland v. National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828, 881, Swayze, J., said: "We are not to be understood, however, as holding that no instrument can hereafter acquire the elements of negotiability unless it answers the requirements of the statute (N. I. L.). Mr. Machen, in his excellent work on Corporations, at section 1740a, calls attention to the danger of holding that the Negotiable Instruments Law prevents a further development of the law merchant; but that question is not before us." See Maine Bank v. Smith, 18 Me. 101, 102.

⁴ Eaglechilde's Case, Het. 167; Litt. 363.

⁵ Woodward v. Rowe, 2 Keb. 105, 132. See, also, Anon., Hardr. 485, Mich. Term, 20 Car. II (1868), believed to be Milton's Case, *vide* 1

Of the many customs of merchants, there were two which were especially the subject of judicial interpretation. They were those concerning instruments which related to the remittance of money from one place to another, and in which credit was used as a means of liquidating indebtedness—*instruments*, in short, which are now called “bills of exchange” and “promissory notes.” Of these, bills, and particularly foreign bills, are by far the more ancient. Anderson, in his History of Commerce,⁶ speaks of one granted by the Emperor Barbarossa to the city of Hamburg in the year 1189. “I remember,” said Chief Justice Holt,⁷ “when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant’s counsel would put them to prove the custom, at which Hale, C. J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord North’s time it was said that the custom in that case was part of the common law of England, and these actions since became frequent, as the trade of the nation did increase, and all the difference between foreign bills and inland bills is that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest.” Between inland bills and promissory notes at first there was no distinction. Both were called indifferently bills of exchange.⁸ The law considered a promissory note in the light of a bill of exchange drawn by a man upon himself, and accepted at the time of drawing.⁹ And it is worthy of remark that the statement accepted by the text writers, and repeated again

Mod. 286; Carter v. Downish (1 W. & M., anno 1688) Show. 127. See, also, complete review of the cases on this subject in the reporter’s note to Mandeville v. Riddle, 1 Cranch, 290, 2 L. Ed. 112.

⁶ 1 And. Com. p. 171.

⁷ Buller v. Crips, 6 Mod. 29.

⁸ Grant v. Vaughan, 3 Burrows, 1525, 1 W. Bl. 488; Edgar v. Chut, 1 Keb. 592, 636; Horton v. Coggs (Mich. Term, 2 W. & M. 6, anno 1683) 3 Lev. 299.

⁹ Marius, in his Advice, p. 3; Lov. Bills & N. p. 22; Kyd, Bills, p. 2.

and again in the cases, that a promissory note was never within the custom of merchants, is incorrect.¹⁰ It was as much a mercantile instrument as a bill of exchange. It was introduced under the custom of merchants, and it was therefore, up to the time of the famous dispute between Lord Holt and the merchants which led to the enactment of the statute of Anne, a negotiable instrument. "The reason of making the statute of Anne," says Lord Hardwicke,¹¹ "arose from some determinations in the beginning of her reign by Holt, Chief Justice, that no action could be maintained on a promissory note nor declaration thereupon."¹² In these decisions Lord Holt denounced promissory notes as "only an invention of the goldsmiths in Lombard street." He declared that "to allow such a note to carry any lien [obligation] with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty."¹³ And, in defiance of established rules, Lord Holt refused to allow to promissory notes the privilege of negotiability.

¹⁰ *Hill v. Lewis*, 1 Salk. 132; *Williams v. Williams* (viz. Pasch. Term, 5 W. & M., anno 1692) Carth. 269; *Bromwich v. Lloyd*, 2 Lutw. 503.

¹¹ *Walmsley v. Child* (anno 1749) 1 Ves. Sr. 346.

¹² *Clerk v. Martin*, 1 Salk. 129, 2 Ld. Raym. 757; *Potter v. Pearson*, 2 Ld. Raym. 759.

¹³ "The term 'specialty' is applied to an instrument which becomes effective by the mere fact of its formal execution. There are two classes of specialty contracts in the English law—common-law specialties and mercantile specialties. The first class includes bonds and covenants—i. e., instruments under seal; the second class includes bills and notes, and policies of insurance, and possibly other mercantile instruments. There is a prevalent notion, traceable to an opinion given in the House of Lords in 1778, in the case of *Rann v. Hughes*, 7 Term R. 350, note, that only contracts under seal can be specialties; all other contracts, whether written or oral, being merely simple contracts. The fallacy of this notion is easily demonstrable by an examination of the resemblances between bills and notes and instruments under seal, on the one hand, and the differences between bills and notes and simple contracts on the other hand, in those points in which specialties and simple contracts most strikingly differ from each other." 2 Ames Cas. Bills & N. 872.

Text of Statute of Anne

At this juncture, in confirmation of the ancient rule, and to meet the rule established by Lord Holt, the statute of Anne was enacted. It is so important, and so often referred to hereafter, that space is given to it. Its most important provisions are as follows: "Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that the person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: Therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted, that all notes in writing whereby any person shall promise to pay to any other person, his order or unto bearer any sum of money mentioned in the note shall be taken and construed to be payable to any such person to whom the same shall be payable; and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are according to the custom of merchants; and that the person to whom such sum of money is payable may maintain an action for the same as he might do upon an inland bill of exchange made, or drawn, according to the custom of merchants; and that any person to whom such note is indorsed, or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain his action for such sum of money either against the person who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange." Thus by the statute of Anne the negotiability of notes was established. Its prin-

ciples have been followed and generally embodied in the statutes of the various states of the Union. And in the many cases which arise with reference to the negotiability of instruments in forms of notes, the point is to determine whether they were such as were within the purview of the statute of Anne, or of the statutes of the various states which have embodied the principles of the statute of Anne.

Construction of Statute of Anne—Non-Negotiable Notes

The statute of Anne, at the hands of the courts, has been construed with great latitude, a latitude in fact which renders somewhat inconsistent and irreconcilable the theories of negotiable and non-negotiable instruments. The English courts after its enactment looked upon it as a remedial statute, as it undoubtedly was. But by a line of cases which seem to go beyond the utmost limits of its evident intendment, the courts also declared that non-negotiable notes came within the statute's provisions.¹⁴ A payee, they decided, could maintain an action within the statute against the maker, by which was meant only that the payee could declare upon the note, under the statute, instead of declaring upon the consideration or transaction which led to its being given. This interpretation, which in its inception was possibly an adaptation of an artificial system of pleading to business needs, has resulted in confusion. In New York,¹⁵ for instance, it seems to be the view of the courts that non-negotiable notes differ from negotiable ones only in two main particulars. One is that the indorser is regarded as a maker or guarantor, and not as a simple indorser; the other that the equities between the parties are not a subject of set-off when the instrument is transferred to a bona fide purchaser for value before maturity. Therefore in New York the general rule of contracts, that there cannot be a recovery upon them without proof of consideration, does not obtain with non-negotiable instruments, and

¹⁴ Kyd, Exch. (1790) 65; SMITH v. KENDALL, 6 Term R. 123, 1 Esp. N. P. 231, Moore Cases Bills and Notes, 4; Burchell v. Slocock, 2 Ld. Raym. 1545; Miller v. Biddle, 13 Law T. (N. S.) 334.

¹⁵ Maule v. Crawford, 14 Hun (N. Y.) 193; Lee v. Swift, 1 Denio (N. Y.) 565; Barrick v. Austin, 21 Barb. (N. Y.) 241.

the non-negotiable promise to pay money is itself presumption of a consideration.¹⁶ So, too, in Massachusetts, where,

¹⁶ President, etc., of Goshen & M. Turnpike Road v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Paine v. Noelke, 53 How. Prac. (N. Y.) 273; 3 Kent, Comm. 77; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424. The New York statute, which was a substantial re-enactment of the statute of Anne, has been replaced by N. I. L. § 320, by which the law in this respect, it seems, has been changed. Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459 (N. I. L.); Kinsella v. Lockwood, 79 Misc. Rep. 619, 140 N. Y. Supp. 513 (N. I. L.); Richards v. Levison (Sup.) 142 N. Y. Supp. 273 (N. I. L.). These cases, therefore, decide that a non-negotiable note is not a mercantile specialty and that to recover upon it a consideration must be alleged and proved. As stated in the text, there is much American authority for the view that a non-negotiable bill of exchange is within the custom of merchants permitting a recovery without alleging and proving a consideration for the acceptor's promise. Kendall v. Galvin, 15 Me. 131, 32 Am. Dec. 141; Coursin v. Leslie's Adm'r, 31 Pa. 506; Louisville E. & St. L. Ry. Co. v. Caldwell, 98 Ind. 245; Windsor Cement Co. v. Thompson, 86 Conn. 511, 86 Atl. 1. And in Mehlberg v. Fisher, 24 Wis. 607, it was held that the obligation of the drawer of a non-negotiable bill was conditional upon due presentation and notice of dishonor. That a non-negotiable bill is a mercantile specialty has also been given as the reason why a parol acceptance of such a bill is not within the Statute of Frauds. JARVIS v. WILSON, 46 Conn. 90, 33 Am. Rep. 18, Moore Cases Bills and Notes, 5; Arnold v. Sprague, 34 Vt. 402. There is no direct support for this conclusion to be found in the English decisions, but there is some evidence that this conclusion is correct. In Chitty on Bills (13th Am. Ed.) 159, it is stated: "As the commercial advantage to be gained from the negotiable quality of bills of exchange was the only reason why our courts allowed in their favor an exception to the rule relative to choses in action, it was once thought that unless they possessed that quality that they would have no greater effect than that of being mere evidences of a contract, and this is still the law in France. * * * But it is now well established in Great Britain that it is not essential to the validity of a bill as an instrument that it be transferable from one person to another." Bills of exchange could be very useful without being negotiable. Probably their first use was for the payment of debts due to foreign parties. Malynes, Lex Mercatoria (Ed. of 1636) p. 252, says: "And even as money was invented * * * to avoid the troublesome carriage of commodities up and down and from one country to another, so (upon like considerations) when other nations (imitating the Romans) did coin monies, exchange by bills for monies was devised to avoid both the danger and adventure of monies and the troublesome carriage there-

although the statute of Anne has never been enacted, its doctrines are regarded as declaratory of the common law,¹⁷

of." See, also, Jenks, Early History of Negotiable Instruments, 9 L. Q. R. 70-85, 3 Anglo-Am. Leg. Essays, 51-71. For this reason it is not surprising to find that Malynes gives as a usual form for a bill of exchange, a form not containing words of negotiability. Malynes, Lex Mercatoria (Ed. of 1636) 261, 262. Malynes was a merchant, and very likely was not well informed as to the history of and reasons for the rules stated in his book. Burdick, Contributions of the Law Merchant to the Common Law, 2 Col. L. R. 470-485, 3 Anglo-Am. Leg. Essays, 34-50. Beawes, Lex Mercatoria (6th Ed.) 563, in giving directions for the drawing up of bills, says: "The remitter must specially observe that the name of the person to whom payment is to be made, be well and truly spelled, or, if it be made to his order, that those words be clearly written." Marius, Advice Concerning Bills (Dublin, 1794) 34, says: "But if the bill be made payable positively to such a man, or his assigns, or order, then an assignment of the bill will not serve the turn, but the money in the strictness of the letter must be immediately paid to such a man in person and he must be known to be the same man mentioned in the *bill of exchange*, that so the money may not be paid to a wrong party, and so the acceptor forced to pay it twice." On pages 7-9 ten examples of bills are printed. Each is dated in 1654. Five are payable "to order," four "to assigns," and one contains no words of negotiability. The decisions in Dawkes v. De Lorane, 3 Wilson, 207, Banbury v. Lisset, Strange, 1211, and Ewers v. Benchkin, 1 Lutw. 82, are not contrary to the conclusion that a non-negotiable bill was a mercantile specialty. Professor Ames considered that the decisions that an action at law could be maintained on a lost non-negotiable bill showed that a non-negotiable bill was not a mercantile specialty. 2 Ames Cas. B. & N. 63, note 4, and cases cited. But perhaps these decisions may be regarded as the enforcement of an equitable cause of action in the common-law courts. As to promissory notes the evidence that a non-negotiable instrument is a mercantile specialty is even more meager. In Lewis v. Orde, 2 Sittings in Middlesex, 8 Geo. II, reported in Cunningham on Bills (3d Ed., 1766, and 6th Ed., 1778) 133, it was held that such a note was a mercantile specialty under the statute of Anne. As pointed out in the text, unless this were true independently of the act, this decision and the American decisions in accordance with it seem erroneous. Williams v. Williams, Carth. 269 (1692), contrary to the first impression one receives from it, does not decide that such a note was a mercantile specialty prior to the statute of Anne. In that case an action on the custom of merchants was held to lie against the indorser of a non-negotiable note. But it does not appear that the indorsement was not a full one, containing words of

¹⁷ Richards v. Barlow, 140 Mass. 218, 6 N. E. 68.

the early English rule is followed.¹⁸ The courts of Connecticut, however, have adopted a different rule.¹⁹ With

negotiability and thus in itself a negotiable bill of exchange. See Bay v. Freazer, 1 Bay (S. C.) 68. There seems, therefore, to be no direct support from English authorities for the following statement, made by the court in Seymour v. Van Slyck, 8 Wend. (N. Y.) 403: "It is not essential to the validity of a bill of exchange or *promissory note* under the statute, or according to the custom of merchants, that it should be negotiable." But the statement seems reasonable because of the early mercantile usefulness of mercantile specialties and the comparatively late realization of negotiability. The truth will be ascertained only by further historical inquiries into the beginnings of negotiability. In 2 Pollock & Maitland, History of English Law, 225, it is said: "In the twelfth century * * * documents of a purely obligatory character were still rare. *They seem to have come hither with the Italian bankers.* They generally took the form of the single bond; the bond with a clause of defeasance seems to be of later date. * * * Often the debtor is bound to pay the money either to the creditor, or any attorney or mandatory of his, who shall produce the bond." Thus not only the idea of enforcement of payment by another than the immediate promisee, but the idea of an obligation embodied in an instrument and existing independently of the transaction out of which it arose, came from the foreign merchants. It is certainly plausible to say that this conception of an obligation as a thing—the formal obligation or specialty—must have preceded the conception of negotiability, when we read the reasons given by the closest students of early law for the inalienability of choses in action among primitive people. Professor Jenks points out that the primitive mind does not think of a transfer of anything except by a delivery. 9 L. Q. R. 70. See 2 Pollock & Maitland, Hist. of Eng. Law, 226. But paper and writing having been conceived of as a thing—an obligation—the market overt of the merchants' fairs furnished the basis for the negotiability of mercantile specialties. See Introduction to Smith's Mercantile Law (11th Ed.) note, p. lxxi. Professor Jenks gives several instances of early mercantile obligations which apparently were non-negotiable. Early Hist. of Neg. Insts., 9 L. Q. R. 70. He says (page 71): "A Placenza Ordinance of the year 1391 compels *Campsores* to give written acknowledgments of moneys deposited with them, and provides for a special and speedy remedy on such documents. *Unfortunately, nothing is said about transferability.*

¹⁸ Townsend v. Derby, 3 Metc. (Mass.) 363; Dean v. Carruth, 108 Mass. 242. But in Massachusetts, in case of disputed consideration, the burden of proof is on the plaintiff. Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Simpson v. Davis, 119 Mass. 269, 20 Am. Rep. 324.

¹⁹ Edgerton v. Edgerton, 8 Conn. 6; Bristol v. Warner, 19 Conn. 7; Daniel, Neg. Inst. § 162; Parl. Bills & N. 227.

them, where the note is not negotiable, it is a mere contract between the original parties, not intended for transfer, and a consideration must be shown.

Non-Negotiable Bills and Notes

Negotiability is not essential to the validity of a bill of exchange, and although it be payable to a designated person, and not to order or to bearer, it imports consideration, and in an action by the payee consideration need not be averred or proved.²⁰ If, however, the instrument lacks any of the essential qualities of a bill of exchange—for example, if it be drawn upon a particular fund, or be payable in another medium than money—no presumption of consideration arises.²¹ Such instruments are, in general, mere assignments or orders. A number of important distinctions between them and negotiable bills are to be pointed out: A person suing the acceptor must show funds in the acceptor's hands to pay,²² for the agreement is not an acceptance, but a mere promise to pay, and must be based upon a sufficient consideration.²³ The acceptor cannot be sued upon the bill, but upon the promise to pay evidenced by the acceptance. The acceptor is under no general liability to pay the bill in the first instance. Non-negotiable

ity." Professor Jenks also refers (page 75) to a bill of exchange involved in the case of *Spinula v. Camby*, decided in 1448 in the town council of Bruges. The bill which was there treated as within the customs of merchants was payable to Bernard Camby and other. Mr. Jenks also gives an instance of a transferable bond prior to 1500. This bond was payable "to F. G., his heirs, or the holder of this letter." It was held by the council of Lübeck (the city which was at the head of the Hanseatic League) that the maker of the obligation could not require the holder of this bond to prove his authority from F. G. before making payment to him." See 2 Pollock & Maitland, Hist. of Eng. Law, 227.

²⁰ *Josselyn v. Lacier*, 10 Mod. 294; *Averett's Adm'r v. Booker*, 15 Grat. (Va.) 163, 76 Am. Dec. 203; *Louisville, E. & St. L. R. Co. v. Caldwell*, 98 Ind. 245; *Arnold v. Sprague*, 34 Vt. 402; *Daniel, Neg. Inst.* § 161; 4 Am. & Eng. Enc. Law, 187. See note 16, *supra*.

²¹ *Raubitschek v. Blank*, 80 N. Y. 479; *Averett's Adm'r v. Booker*, 15 Grat. (Va.) 163, 76 Am. Dec. 203; *Wells v. Brigham*, 6 Cush. (Mass.) 6, 52 Am. Dec. 750; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691.

²² *Munger v. Shannon*, 61 N. Y. 251.

²³ *Atkinson v. Manks*, 1 Cow. (N. Y.) 691.

bills are assignments in the sense that they are directions to appropriate and hold the property specified in them to the use of a third person.²⁴ The third person thus has rights assigned to him, and this whether the bills call for the whole or part of the fund, and whether or not the orders are assented to by the drawee, so long as the drawee has notice of them.²⁵

There are some features which non-negotiable bills and non-negotiable notes also have in common. When transferred, it is by operation of the theory of assignment, and not of indorsement,²⁶ and the fact of possession of either the bill or note is not evidence of such title that its mere production upon a trial is *prima facie* evidence of a right to recover. And, lastly, title to either a non-negotiable bill or note is subject to every equity.²⁷ Under the strict common-law rule the indorsee of a bill or note, in its terms not negotiable, may sue his immediate indorser in his own name, but he can only sue the maker or remote indorser in the name of the original payee, except where special statute otherwise provides. The indorser of paper not negotiable is only responsible to parties not immediate where he especially contracts to be so, being treated as guarantor or maker. And, lastly, an indorser of either cannot insist on demand and notice as a condition precedent.²⁸

²⁴ *Morton v. Naylor*, 1 Hill (N. Y.) 583; *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Row v. Dawson*, 1 Ves. Sr. 331; *Lett v. Morris*, 4 Sim. 607; *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515; *Ehrichs v. De Mill*, 75 N. Y. 370; *Robbins v. Bacon*, 3 Greenl. (Me.) 346; *Bank of Commerce v. Bogy*, 44 Mo. 18, 100 Am. Dec. 247.

²⁵ *Lowery v. Steward*, 25 N. Y. 239, 243, 82 Am. Dec. 346.

²⁶ An assignment, as applied to bills and notes, is the transfer, by writing, of an interest therein. *Franklin v. Twogood*, 18 Iowa, 515.

²⁷ *GILLEY v. HARRELL*, 118 Tenn. 115, 101 S. W. 424, Moore Cases Bills and Notes, 7.

²⁸ *Richards v. Warring*, 4 Abb. Dec. (N. Y.) 50; *McMullen v. Rafferty*, 89 N. Y. 456; *Cromwell v. Hewitt*, 40 N. Y. 491, 100 Am. Dec. 527; *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Shinn v. Fredericks*, 56 Ill. 439; *Rabberman v. Muehlhausen*, 3 Ill. App. 326; *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466; *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23. But where the indorsement is in such form that it is the drawing of a negotiable bill, the liability of the

DISTINCTION BETWEEN ASSIGNABILITY AND NEGOTIABILITY

- 2. Assignability** pertains to contracts in general.
- 3. An assignment** is the legal method of giving to another the power to enforce one's own choses in action.
- 4. It is an impracticable method**, as regards a circulating medium, because:
 - (a) Title created by assignment, as against the debtor, is not complete without notice to the debtor.
 - (b) No subsequent purchaser of the property or right can acquire better title than that of his immediate assignor.
- 5. Negotiability** pertains to a special class of contracts.
- 6-7. Negotiability** facilitates their transfer as a circulating medium, because the transfer of legal rights is effected by indorsement or change of possession.

We purpose here to state briefly the fundamental reasons why negotiable bills and notes could not readily be transferred as a circulating medium under the rules governing the transfer of ordinary choses in action. The rights evidenced or created by ordinary contractual obligations are almost always a kind of property, having in themselves a value measured in law by the damages assessable upon their breach. This property may at this stage of the law pass from person to person just as any other property does. But there are well-settled rules governing such transfer, which are the outgrowth and mingling of early doctrines of the courts of common law and of equity, and at which the student must glance to understand the rules themselves. To this must also be added the statement that statutes, from time to time, have been largely instrumental in moulding these doctrines of common law and of equity into the form which the theory of assignment of choses in action presents at the present time.

indorser is the liability of the drawer of such a bill. *Bay v. Freazer*, 1 Bay (S. C.) 66.

Assignment

It was probably the common-law rule in the first instance that no assignee of the benefits of a contract could sue for and recover them. The primitive view was, in the first place, that the contract created a strictly personal obligation between the creditor and the debtor, and also that the assignment of choses in action would increase litigation—a reason which led the courts to set their faces resolutely against it.²⁹ And whether from reasons of business expediency, or because they were influenced by equitable doctrines, is not clear, but the courts of common law at an early day modified this rule into one that for a long time prevailed, namely, that an assignment of a contract might be made, but the assignee must sue for its benefit in the name of the assignor or his representatives. The theory was that the courts of common law would so far take cognizance of equitable rights created by the assignment that the name of the assignor might be used as a trustee of the benefits of the contract for the benefit of the assignee.³⁰ This doctrine has been generally modified by statutes, the commonest ones, in the United States, being the provisions of the various Codes—that “every action must be prosecuted by the real party in interest,” and that the “transfer of every claim or demand passes an interest which the transferee may enforce by an action in his own name, as the transerrer might have done.”³¹ With courts of equity, it is true, the rule was different. For in equity, from immemorial times, the assignment of a chose in action or of the benefits under a contract has been permitted, and the assignee could maintain a suit in equity in his own name.³² But, however salutary the operation of this equitable rule

²⁹ Pol. Cont. 207; Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

³⁰ Caister v. Eccles, 1 Ld. Raym. 683; McWilliams v. Webb, 32 Iowa, 577; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31.

³¹ But see BARROW v. BISPHAM, 11 N. J. Law, 110, Moore Cases Bills and Notes, 2.

³² Smith v. Brittain, 8 Ired. Eq. (38 N. C.) 347, 42 Am. Dec. 175; Tibbetts v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307.

might have been in some phases of the enforcement of contract rights, it could have had little influence with bills and notes. Cases arising upon them came within the cognizance of the courts of common law. And there are cases to show that even when the assigned non-negotiable promise was to pay a sum of money to the promisee, or to bearer, or to order, or where, by any other form of words, the instrument purported to be made assignable, even then the holder could not sue in his own name, but only in that of his assignor.³³ This objection, inasmuch as it related only to the form of action, was not of vital importance. Yet were it the rule that the transferees of negotiable instruments must sue in the name of their transmitters, it would certainly clog their circulation, since it would complicate and render less certain the recovery of judgments upon them.

There were other rules relating to the transfer of ordinary contracts, governing alike courts of common law and equity, which were of greater practical importance. The first is the doctrine of notice. The rule governing assignment, as stated in the principal text, is that title by assignment, as against the debtor, is not complete without notice to him. As the result of this rule, follows the one that a debtor who performs his contract to the original creditor, without notice of any assignment by the creditor to another person, is released from his obligation under it.³⁴ An illustration of this principle is a well-known case where a bond and mortgage had been given, and assigned by various intermediate assignments, not recorded until some nine years afterwards. At that time the mortgage was attempted to be foreclosed by the true owner. In the meantime the mortgagor had made various payments upon the mortgage, and finally had paid it up in full to the original mortgagee,

³³ Coolidge v. Ruggles, 15 Mass. 387; Clark v. King, 2 Mass. 524; Weidler v. Kauffman, 14 Ohio, 455; Jones v. Carter, 8 Q. B. 134.

³⁴ Judson v. Corcoran, 17 How. 612, 15 L. Ed. 231; Van Buskirk v. Hartford Fire Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Smith v. Ewer, 22 Pa. 116, 60 Am. Dec. 73; Merchants' & Mechanics' Bank of Chicago v. Hewett, 3 Iowa, 93, 66 Am. Dec. 49; Winberry v. Koonce, 88 N. C. 351; Hobson v. Stevenson, 1 Tenn. Ch. 203; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240.

some three years before the foreclosure. These payments, on the mortgagor's part, were made without notice or knowledge of the assignments. And upon these facts it was held that the mortgagor was to be protected, and would even have been protected if the assignments had been recorded, because notice must be given or brought home to the mortgagor not to pay the original mortgagee, else payments to such mortgagee on account of the mortgage are perfectly valid.³⁵ This is the logical outgrowth of the theory of assignment, as explained in the English case of Stocks v. Dobson.³⁶ "The debtor," said the court, "is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? The law, therefore, has required notice to be given to the debtor of the assignment, in order to perfect the title of the assignee."

There is another feature of assignments to be considered. It is true that the courts in many of the states at the present day will decline to examine into the consideration of the assignment of an ordinary contract, holding that a payment of it by the debtor to the person who holds the rights under a valid assignment will release the debtor from his liability.³⁷ But it was probably the common-law rule, and certainly the equity rule, that an assignment would not be supported unless consideration had been given by the assignee.³⁸

Negotiability

The rules in regard to negotiability are in sharp contrast with these principles governing assignments. If a negotiable bill or note is made payable to bearer, or indorsed in

³⁵ Van Keuren v. Corkins, 66 N. Y. 77.

³⁶ Stocks v. Dobson, 4 DeGex, M. & G. 15.

³⁷ Sheridan v. Mayor, etc., of City of New York, 68 N. Y. 30; Burnett v. Gwynne, 2 Abb. Prac. (N. Y.) 79; Stone v. Frost, 61 N. Y. 614; Allen v. Brown, 44 N. Y. 228; Durgin v. Ireland, 14 N. Y. 322.

³⁸ Anson, Cont. p. 222.

blank, the debtor is *prima facie* protected in payments made to the person who has the instrument in his possession.³⁹ The person having the instrument in his possession is, under such circumstances, presumed to own it, and to have a legal right to it.⁴⁰ A purchaser in good faith from one who has stolen it acquires a valid title.⁴¹ If these were not the rules every bank or merchant who took the instrument, and gave money or value for it, would be compelled to make inquiries, and also give notice of ownership of the instrument to all prior parties, in order to prevent the instrument being paid to some one else. Several results would inevitably flow from these conditions. Business men would decline to take such trouble. This friction would check the circulation of bills and notes, and destroy their effectiveness as a quasi money.

Equities between Prior Parties

The last and perhaps most important distinction made between the transfers of non-negotiable contracts and those of negotiable bills and notes is that in case of the former the assignee takes subject to the equities or defenses existing between the prior parties, while the bona fide holder of a negotiable instrument may disregard these equities, and recover upon suit the full amount called for by the instrument he buys. According to the Honorable Theodore Dwight,⁴² the assignee of a non-negotiable contract takes subject, not only to the equities existing between the original parties, but also must always abide the case of the person from

³⁹ *Pettee v. Prout*, 3 Gray (Mass.) 502, 63 Am. Dec. 778; *Way v. Richardson*, 3 Gray (Mass.) 412, 63 Am. Dec. 760; *Garvin v. Wiswell*, 83 Ill. 215; *Jewett v. Cook*, 81 Ill. 280; *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170; *Rubey v. Culbertson*, 35 Iowa, 284; *Ecton v. Hallan*, 20 Kan. 452; *Wells v. Schoonover*, 9 Heisk. (Tenn.) 806.

⁴⁰ *Wilson Sewing-Mach. Co. v. Spears*, 50 Mich. 534, 15 N. W. 894; *First Nat. Bank v. Sollenberger*, 1 Lancast. Law Rev. (Pa.) 75.

⁴¹ *PEACOCK v. RHODES*, 2 Doug. 633, Moore Cases Bills and Notes, 1; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Birdsall v. Russell*, 29 N. Y. 220; *Evertson v. National Bank of Newport*, 66 N. Y. 14, 23 Am. Rep. 9.

⁴² *Trustees of Union College v. Wheeler*, 61 N. Y. 88.

whom he buys. The holder of a chose in action cannot alienate anything but the beneficial interest he possesses.⁴³ It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. This is undoubtedly the law in England and in New York, though in many of the states of the Union the great authority of Chief Justice Kent has prevailed to limit the equities to those existing between the original parties, and does not extend them to those existing in favor of third parties. The technical or theoretical reason of the rule is that given by Judge Story.⁴⁴ "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property into possession." This theory leads to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name, and on the supposition that, for the purposes of the action, he is still the owner.

WORDS OF NEGOTIABILITY

8. The instrument must contain express words of negotiability, although there is no set form of such expression. It is enough if the intention of the parties to make it negotiable can be fairly construed from the terms of the contract.⁴⁵

⁴³ *Warner v. Whittaker*, 6 Mich. 133, 72 Am. Dec. 65; *Seligman v. Ten Eyck's Estate*, 49 Mich. 104, 13 N. W. 377; *Shotwell v. Webb*, 23 Miss. 375; *Howell v. Medler*, 41 Mich. 641, 2 N. W. 911; *Ayres v. Campbell*, 9 Iowa, 213, 74 Am. Dec. 346; *Timms v. Shannon*, 19 Md. 296, 81 Am. Dec. 632; *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. 438; *Cary v. Bancroft*, 14 Pick. (Mass.) 315, 25 Am. Dec. 383; *Harwood v. Jones*, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; *Scott v. Schreeve*, 12 Wheat. 605, 6 L. Ed. 744.

⁴⁴ *Story, Eq. Jur.* § 1040.

⁴⁵ But see p. 25, note 68, *infra*. See, also, note 2, *supra*.

9. The usual form of making an instrument negotiable
is making it payable either

- (a) To order, or
- (b) To bearer.⁴⁶

It is the purpose of these sections to explain what form of words, when they occur in an order or promise to pay money, makes that order or promise a negotiable one; or, in other words, what are the indicia of negotiability. As has been said, negotiability is the peculiar theory of the law merchant, and the law merchant has as its source the usages of trade, which have been recognized and formulated into rules of law by the courts, and sometimes declared, and even modified, by statute.

The first question, then, is, what indicia are declared by the statutes to confer negotiability upon orders or promises to pay money? These indicia consist in the first place in certain words or phrases created by and appearing in the statute itself. The statute of Anne, for example, declares, in words, that "all notes whereby one doth promise to pay to any other person, his order, or unto bearer, shall be assignable or indorsable over as inland bills of exchange, according to the custom of merchants."⁴⁷

In very many states these words of the statute of Anne, or words quite similar to them, have been re-enacted. In some states, in addition to the foregoing phrases, specified in the statute of Anne, peculiar phrases are essential to negotiability. In some states negotiability has been limited to notes containing the words "without defalcation and discount."⁴⁸ In Alabama⁴⁹ only bills of exchange and promissory notes payable in money at a bank, or private banking house, or other place of payment expressed, are made negotiable, and governed by the law merchant; other con-

⁴⁶ N. I. L. § 1, subd. 4; McMullen v. Rafferty, 89 N. Y. 456; Cromwell v. Hewitt, 40 N. Y. 491, 100 Am. Dec. 527. See p. 35, note 14, *infra*.

⁴⁷ Goodwin v. Robarts, L. R. 10 Exch. 337, Johns. Cas. Bills & N. 3.

⁴⁸ See Rand. Com. Paper, § 86.

⁴⁹ Code 1886, §§ 1756, 1757.

tracts in writing being assignable subject to defenses.⁵⁰ In Indiana⁵¹ promissory notes, to be negotiable independent of equities, must be payable to order or bearer at a bank in Indiana. In Kentucky⁵² only such promissory notes as are made payable and negotiable at a bank incorporated by the state law, and are indorsed and discounted by such bank or some other bank in Kentucky, are negotiable like foreign bills of exchange; all other bills and notes are assignable subject to defenses.⁵³ And to determine whether an instrument contains the quality of negotiability, we must first turn to the statute of the state, and, if there appear upon the face of the instrument the phrases authorized by the statute, then, other things being equal, the instrument is negotiable. And, as appears hereafter, except in the case of a restrictive indorsement, an instrument once stamped by the original parties with the character of negotiability in most cases cannot be deprived of this characteristic, but remains so despite the subsequent agreement or conduct of the parties transferring it.

While it is unquestioned that bills and notes, correct in other respects, drawn in the words of the statutes, are negotiable, those words are not the only forms of words which will confer negotiability. Some express words are, however, necessary to confer this quality. A note in words,⁵⁴ "8 months after date, we promise to pay G. H. \$275, for value received," was held not a negotiable note,

⁵⁰ See *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. Ed. 580.

⁵¹ *Horner's Rev. St.* § 5506.

⁵² *St. § 483.*

⁵³ *St. § 474.* It is impossible in a work of this character to enumerate or discuss the various statutory provisions peculiar to different states. They are collected in *Rand. Com. Paper*, §§ 96, 128, 174. In many states such provisions have been repealed by enactment of the Negotiable Instruments Law.

⁵⁴ *Maule v. Crawford*, 14 Hun (N. Y.) 193. See, also, *Robinson v. Brown*, 4 Blackf. (Ind.) 128; *Fernon v. Farmer's Adm'r*, 1 Har. (Del.) 32; *Yingling v. Kohlhass*, 18 Md. 148; *Barriere v. Nairac*, 2 Dall. 249, 1 L. Ed. 368; *Whitwell v. Winslow*, 134 Mass. 343; *American Exch. Bank v. Blanchard*, 7 Allen (Mass.) 333; *Fawsett v. National Life Ins. Co. of United States*, 97 Ill. 11, 37 Am. Rep. 95; *Lowy v. Andreas*, 20 Ill. App. 521.

because the statute directed words of negotiability. But the true reason is that laid down by Lord Holt,⁵⁵ given in a case where the words "or his order" were omitted from a bill. "And the chief justice did agree that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee, for the words 'or his order' did give authority to assign it by indorsement, and it is an agreement by the first drawer that he would answer it to the assignee."

What words will then be deemed by the courts to confer negotiability? "Whether the parties to an instrument can give it a negotiable character, with all the incidents pertaining to negotiable paper, when it is not in terms within the class of instruments known to the law as 'negotiable,' may be questioned," says Allen, J., in *Evertson v. National Bank*.⁵⁶ But, however this may be with instruments intended to be other than orders or promises for the payment of money alone, still it is probably the rule that, in the instruments governed by the rules of the law merchant, any words in a bill or note whence it can be inferred that the person making it intended it to be negotiable, will give it a transferable quality against that person.⁵⁷

NEGOTIABLE BONDS

10. By mercantile custom bonds which conform to certain requirements have become negotiable, although they are common-law specialties.

Bonds

We have already pointed out⁵⁸ that by the custom of merchants bonds under seal (whether corporate or indi-

⁵⁵ *Hill v. Lewis*, 1 Salk. 132.

⁵⁶ 66 N. Y. 18, 23 Am. Rep. 9. See, also, *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 193; *Robinson v. Wilkinson*, 38 Mich. 299; *ALMY v. WINSLOW*, 126 Mass. 342, *Moore Cases Bills and Notes*, 72; *Grinnell v. Baxter*, 17 Pick. (Mass.) 386; *Daggett v. Daggett*, 124 Mass. 149; *Judson v. Gookwin*, 37 Ill. 286.

⁵⁷ *PUTNAM v. CRYMES*, 1 McMUL. (S. C.) 9, 36 Am. Dec. 250, *Moore Cases Bills and Notes*, 7.

⁵⁸ Note 2, *supra*.

vidual), which contain words of negotiability and otherwise comply with the same formal requisites as a bill or note, are negotiable mercantile specialties. The law merchant with respect to such bonds is almost entirely the same as that relating to bills and notes. Thus, at least in the absence of a special custom to the contrary,⁶⁹ uncertainty of the time of payment makes the bond non-negotiable.⁷⁰ The implied terms of the indorser's contract are the same as in the case of a bill or note.⁷¹ In the absence of special custom, however, the obligor of such a bond is not entitled to days of grace.⁷² Many interesting questions have arisen as to interest coupons detachable from such bonds. Thus it is held, where the coupon is complete in form as a promissory note and is detached from the sealed bond, that it is still a sealed instrument within the meaning of the statute of limitations.⁷³ So it has been held that assumpsit will not lie on such a coupon unless, in the jurisdiction in question, assumpsit lies on a sealed instrument.⁷⁴ On the other hand, days of grace are allowed on such coupons,⁷⁵ and they have been held to be within the scope of statutes relating in terms only to promissory notes and bills of exchange.⁷⁶ Finally, it has been held that such coupons are negotiable, although they do not contain a promise to pay expressed upon or implied in the language on the face of

⁶⁹ See note 2, *supra*.

⁷⁰ *Chotteau v. Allen*, 70 Mo. 290; *Jackson v. Vicksburg, S. & T. R. Co.*, 2 Woods, 141, Fed. Cas. No. 7,150. So the promise to pay must be unconditional. *McClelland v. Norfolk S. Ry. Co.*, 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397. And the promise must be to pay a sum certain. *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457. See note 2, *supra*, as to the modification of these requirements by new customs and the effect of the N. I. L.

⁷¹ *Bonner v. City of New Orleans*, 3 Fed. Cas. No. 1,631; *Taylor v. Branch*, 1 Stew. & P. (Ala.) 249, 23 Am. Dec. 293; *Hicks v. Vann*, 4 Ark. 526.

⁷² 7 Cyc. 537, 867-872; *Lamkin v. Nye*, 43 Miss. 241; *Skidmore v. Little*, 4 Tex. 301; *Arents v. Com.*, 18 Grat. (Va.) 750, *semel*. But see *Jones, Corp. Bonds & Mort.* (3d Ed.) § 245.

⁷³ *City of Kenosha v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

⁷⁴ *Clarke v. Janesville*, 1 Biss. 98, Fed. Cas. No. 2,854.

⁷⁵ 2 Daniel, *Neg. Inst.* (5th Ed.) 445, 446; 7 Cyc. 538, 869.

⁷⁶ *Cooper v. Thompson*, 18 Blatchf. 434, 438, 6 Fed. Cas. No. 3,202.

the coupon;⁶⁷ and it is submitted that independently of statute these coupons may be negotiable, although not containing the so-called words of negotiability.⁶⁸

PAYMENT BY NEGOTIABLE INSTRUMENT

11. The common rules regarding a negotiable instrument as a medium of payment are as follows:

- (a) Where a negotiable instrument to which the debtor is a party as drawer, acceptor, maker, or indorser is received for a debt, whether precedent or contemporaneous, in the absence of agreement to the contrary a presumption arises in most jurisdictions that the instrument is received in conditional, and not in absolute, payment.
- (b) Where a negotiable instrument to which the debtor is not a party is received for a debt, in the absence of agreement to the contrary a presumption arises in most jurisdictions that the instrument is received in conditional payment if the debt was precedent; but that it is received in absolute payment if the debt be contemporaneous.

Whether a payment by bill or note is absolute (that is, in extinguishment of the debt) or conditional (that is, in extinguishment of the debt only on condition that the bill or note be paid at maturity) is to be determined by the intention of the parties; and if their intention has been expressed, or can be gathered from the circumstances, it will always govern. But, in the absence of agreement, express or implied, certain presumptions as to the intention of the parties have become established. It is said on high authority that in refusing to hold that acceptance of a bill or note, as in case of acceptance of an instrument under seal, works an extinguishment and merger of the debt in the new security, the courts have failed to give full effect to the cus-

⁶⁷ *Arentz v. Com.*, 18 Grat. (Va.) 750.

⁶⁸ *Smith v. Clark County*, 54 Mo. 58. See note 2, supra.

tom of merchants.⁶⁹ Certain it is that for lack of a guiding principle the courts have been led into hopeless confusion in their efforts to arrive at the presumed intention of debtors and creditors. It is believed, however, that the preponderance, if not the weight, of authority will be found to support the rules stated in the principal text.

Proceeding upon the theory that bills and notes in this respect are not specialties, but simple contracts, and because a simple executory contract is not extinguished by acceptance of another, it is generally held that, in the absence of agreement to that effect, acceptance of a bill or note of the debtor on account of the debt does not extinguish it. Yet the taking of the bill or note is not without effect upon the right of the creditor to enforce his debt. His remedy for its enforcement is suspended; but, if the bill or note is dishonored,⁷⁰ his right to sue on the original debt revives. In other words, the presumption arises that the payment is conditional.⁷¹ So, where a bill or note of the debtor is accepted

⁶⁹ 2 Ames Cas. Bills & N. 874.

⁷⁰ It seems more accurate to say that, where the debtor who gives the instrument on account of his debt is a party to the instrument, the original debt becomes again due and payable, if such party defaults in his liability on the instrument to the creditor. Thus, where a debtor indorses a bill on account of a debt, if no notice of dishonor is given him, he cannot be sued upon the original debt, although clearly the instrument has been dishonored. *Brown v. Schintz*, 202 Ill. 509, 67 N. E. 172; *Pink Front Bankrupt Store v. G. A. Mistrot & Co.*, 40 Tex. Civ. App. 375, 90 S. W. 75. Compare *Fritz v. Kennedy*, 119 Iowa, 628 (N. I. L.); *American Nat. Bank v. National Fertilizer Co.*, 125 Tenn. 328, 143 S. W. 597 (N. I. L.); *Williams v. Braun*, 14 Cal. App. 396, 112 Pac. 465; *Wood v. Luttrell*, 1 Call (Va.) 232, 237.

⁷¹ *Clark v. Mundal*, 1 Salk. 124; *Richardson v. Rickman*, cited in 5 Term R. 517; *Price v. Price*, 16 Mees. & W. 232; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Lewis v. Davisson's Ex'r*, 29 Grat. (Va.) 216; *McLaren v. Hall*, 26 Iowa, 298; *Archibald v. Argall*, 53 Ill. 307; *Logan v. Attix*, 7 Iowa, 77; *Jones v. Shawhan*, 4 Watts & S. (Pa.) 261; *Lee v. Green*, 83 Ala. 491, 3 South. 785; *McGuire v. Bidwell*, 64 Tex. 43; *Henry v. Conley*, 48 Ark. 271, 33 S. W. 181; *Hopkins v. Detwiler*, 25 W. Va. 748; *Selby v. McCullough*, 26 Mo. App. 67; *Riverside Iron-Works v. Hall*, 64 Mich. 168, 31 N. W. 152; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Merrick v. Boury*, 4 Ohio St. 60; *Cole v. Sackett*, 1 Hill (N. Y.) 516. Compare *Hunt v.*

on account of a contemporaneous debt—as upon a sale of goods—the same presumption, though perhaps with even less reason, is held to arise.⁷² The same rule prevails where the debtor gives on account of a precedent debt the bill or note of a third person, whether the paper be indorsed by the debtor or be simply payable to bearer, and without the debtor's indorsement.⁷³ Where, however, the debtor gives the bill or note of a third person on account of a contemporaneous debt, a distinction is drawn between paper indorsed by the debtor and paper payable to bearer, or indorsed in blank by the payee or drawee, but without the indorsement or guaranty of the debtor. In the first case the general rule holds good, such paper being regarded in the same light as a bill or note to which the debtor was an original party;⁷⁴ but in the second case the usual presumption is reversed and the creditor is presumed to accept the paper in absolute payment.⁷⁵ "I am of the opinion, and always was," said Lord Holt, "notwithstanding the noise and cry that it is the use of Lombard street, that the acceptance of such a note [the note of a third person, payable to bearer] is not actual payment. Taking a note for goods sold is payment, because it was part of the original con-

Panhandle Lumber Co., 66 Wash. 645, 120 Pac. 538 (N. I. L.); Lester Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 S. E. 212.

⁷² Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215. See Daniel, Neg. Inst. § 1261.

⁷³ Ward v. Evans, 2 Ld. Raym. 928; Ex parte Blackburn, 10 Ves. 204; Downey v. Hicks, 14 How. 249, 14 L. Ed. 404; Gallagher v. Roberts, 2 Wash. C. C. 191, Fed. Cas. No. 5,195; Noel v. Murray, 13 N. Y. 167; Gordon v. Price, 32 N. C. 388; McGinn v. Holmes, 2 Watts (Pa.) 121; Dougal v. Cowles, 5 Day (Conn.) 511; Slocumb's Adm'r v. Holmes' Adm'r, 1 How. (Miss.) 139; Cave v. Hall, 5 Mo. 59. As pointed out in note 68, supra, the condition is a different one where the debtor is as a party to the instrument liable to the creditor. This distinction seems to have been overlooked in Williams v. Brown, 80 App. Div. 628, 80 N. Y. Supp. 247.

⁷⁴ Monroe v. Hoff, 5 Denio (N. Y.) 360; Shriner v. Keller, 25 Pa. 61.

⁷⁵ Ward v. Evans, 2 Ld. Raym. 928, per Holt, C. J.; Clark v. Munday, 1 Salk. 124; 12 Mod. 203; Bank of England v. Newman, 1 Ld. Raym. 442; Whitbeck v. Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Gibson v. Tobey, 46 N. Y. 637, 7 Am. Rep. 397; Bicknall v. Warterman, 5 R. I. 43.

tract; but paper is no payment where it was a precedent debt. For when such a note is given ~~in~~ payment, it is always to be taken under this condition: to be payment if the money be paid thereon in convenient time."⁷⁶ These various presumptions, since they rest on the presumed intention of the parties, may all be rebutted by evidence showing a different intention on their part. In some jurisdictions, on the other hand, the ordinary rule is reversed, and, where a promissory note or bill of exchange is given on account of indebtedness, the payment is presumed to be absolute, though this presumption may be rebutted."⁷⁷

The rule that a bill or note is presumed to be merely conditional payment is, of course, applicable where the instrument is accepted in renewal of one already due, which is not surrendered.⁷⁸

⁷⁶ *Ward v. Evans*, 2 Ld. Raym. 928.

⁷⁷ *Fowler v. Bush*, 21 Pick. (Mass.) 230; *Ely v. James*, 123 Mass. 44; *O'Conner v. Hurley*, 147 Mass. 149, 16 N. E. 764; *Gooding v. Morgan*, 37 Me. 419; *Collamer v. Langdon*, 29 Vt. 32; *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149.

⁷⁸ *Bishop v. Rowe*, 3 Maule & S. 362; *Cumber v. Wane*, 1 Strange, 426; *Woods v. Woods*, 127 Mass. 141; *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476.

CHAPTER II

OF NEGOTIABLE BILLS AND NOTES, AND THEIR FORMAL AND ESSENTIAL REQUISITES

12. Definition and Forms of Bills of Exchange.
13. Definition and Form of Note.
14. Essentials of Bill or Note.
15. Order Contained in Bill.
16. Promise Contained in Note.
- 17-20. Certainty as to the Terms of the Order or Promise.
- 21-25. Payment of Money Only.
- 26-30. Specification of Parties.
- 31-33. Capacity of Parties.
34. Authority of Agent.
- 35-37. Delivery of Instruments.
38. Date.
39. Value Received.
40. Days of Grace.

DEFINITION AND FORMS OF BILLS OF EX- CHANGE¹

12. A bill of exchange is an unconditional order in writing upon one person by another for the payment of a sum of money absolutely and at all events.²

Bills of exchange are classified as foreign bills and inland bills.

The following is a common form of foreign bill of exchange in a set:

Buffalo, N. Y., U. S. A., June 15, 1891.

First. Exchange for London.

Co

Thirty days after sight of this First of Exchange (Second and Third Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of

THOMAS ROBINSON.

To Baring Bros. & Co.

London, Eng^{land}

¹ The student is recommended to fix in his mind rather the statement of the essential elements of bills as given in section 14, than the formulated definition.

² See N. I. L. § 126. Before the N. I. L. a sealed writing, though

Buffalo, N. Y., U. S. A., June 15, 1891.

Second. Exchange for London.

£500 Thirty days after sight of this Second of Exchange (First and Third Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of

THOMAS ROBINSON.

To Baring Bros. & Co.,
London, Eng.

Buffalo, N. Y., U. S. A., June 15, 1891.

Third. Exchange for London.

£500 Thirty days after sight of this Third of Exchange (First and Second Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to amount of

THOMAS ROBINSON.

To Baring Bros. & Co.,
London, Eng.

The following is a usual form of an inland bill:

\$500.00. C. B. Buffalo, June 15, 1891.
Thirty days after sight pay to the order of JOHN SMITH
Five Hundred Dollars, value received, and charge to account of
THOMAS ROBINSON.

To Baring Bros. & Co., ACCEPTED.
New York City.

Baring Bros.

The parties to the foregoing bill are technically termed:
 (a) The drawer, or the party who orders the payment of the money in the bill, e. g. Thomas Robinson. (b) The drawee or the party to whom the order is directed, e. g. Baring Bros. (c) The acceptor, or the drawee when he has assented to the order, and thus become the principal debtor on the bill, e. g. Baring Bros. (d) The payee, or the party in whose favor the order is made, e. g. John Smith. These are the parties to the bill in its origin. There are also subsequent parties: (e) The holder, or the person having legal possession of the bill, who, when it is negotiable, may recover the amount of the same. This term includes payee, indorsee, and bearer. (f) The indorser, or

one who directs the amount of the bill to be paid to a person in the indorsement named, or to his order or to bearer.
(g) The indorsee, or one who makes title to the bill through the indorsement.

A bill of exchange is usually called among business men a "draft." When duly accepted, it is called an "acceptance."

Anglo-American law classifies bills of exchange as either inland or foreign. According to English law an inland bill is one which is both drawn and payable within the British Islands (or both drawn and addressed to a drawee resident therein). Any other bill is a foreign bill.³ In the states of the United States similar definitions are accepted.⁴ Each state defines an inland bill as one both drawn and payable within its boundaries. For the purpose of the definition of a foreign bill, each state regards all other states of the Union, as well as foreign nations, as independent sovereignties.⁵ Accordingly a bill which is both drawn and payable

otherwise in the form of a bill or note, was not an instrument of the law merchant. Its force, if any, was that of a common-law contract. *Clark v. Farmers' Woolen Mfg. Co.* of Benton, 15 Wend. (N. Y.) 256; *Muse v. Dantzler*, 85 Ala. 361, 5 South. 178; *Brown v. Jordahl*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560; *Talbott v. Suit*, 68 Md. 443, 13 Atl. 356; *D. M. Osborne & Co. v. Hubbard*, 20 Or. 318, 25 Pac. 1021, 11 L. R. A. 833. The bills and notes of corporations were generally recognized as exceptions to this doctrine. *Jackson v. Myers*, 43 Md. 452; *Weeks v. Easler*, 143 N. Y. 374, 38 N. E. 377; *Central Nat. Bank of Columbia v. Charlotte, C. & A. R. Co.*, 5 S. C. 156, 22 Am. Rep. 12; *In re Imperial Land Co.*, L. R. 11 Eq. 498. But N. I. L. § 6, subd. 4, which provides that the validity and negotiable character of a bill or note is not affected by the fact that it is sealed, changes the law. *Arnd v. Heckert*, 108 Md. 300, 70 Atl. 416 (N. I. L.); *St Paul's Episcopal Church v. Fields*, 81 Conn. 670, 72 Atl. 145 (N. I. L.).

³ B. E. A. §§ 4, 51 (subds. 1, 2); *Chalmers, Bills* (7th Ed.) 16, 17; *Russell, Bills*, 104, 105; *MacLaren, Bills* (4th Ed.) 85, 86.

⁴ N. I. L. §§ 129, 152; *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450 (N. I. L.); *Pavenstedt v. New York Life Ins. Co.*, 203 N. Y. 91, 96 N. E. 104, Ann. Cas. 1913A, 805 (N. I. L.); *Bank of Laddonia v. Bright-Coy Commission Co.*, 139 Mo. App. 110, 120 S. W. 648 (N. I. L.).

⁵ *Halliday v. McDougall*, 20 Wend. (N. Y.) 81; *Id.*, 22 Wend. 234; *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269; *Dickins v. Beal*, 10 Pet. 572, 9 L. Ed. 538; *Bank of United States v. Daniel*, 12

in one state is an inland bill by the law of that state, but a foreign bill by the law of every other state, notwithstanding its inland character in the state where it is drawn and payable. There is, therefore, no third class of "foreign inland bills."⁶ Thus, a bill drawn in New York and payable in Chicago, or vice versa, is a foreign bill by the law of New York, of Illinois, and of every other state. But a bill drawn and payable in New York is an inland bill by the law of New York, but a foreign bill by the law of Illinois and of every other state except New York. The significance at the present time of this classification of bills into inland and foreign lies in the rule of Anglo-American law that inland bills need not be protested by a notary upon their dishonor in order to charge the drawer and indorsers, while foreign bills must be.⁷ Since a foreign bill may not indicate its

Pet. 32, 9 L. Ed. 989; *Phoenix Bank v. Hussey*, 12 Pick. (Mass.) 483; *Grimshaw v. Bender*, 6 Mass. 157; *Barclay v. Minchin*, 6 Mass. 162.

⁶ Thomson, Bills (Wilson's Ed.) 2. See *Sublette Ex. Bank v. Fitzgerald*, 188 Ill. App. 240 (N. I. L.).

⁷ Holt, C. J., in *Bullen v. Crips*, 6 Mod. 29; B. E. A. § 51; N. I. L. § 152. A bill, therefore, drawn in New York and payable and dishonored in Chicago, must be protested. Since the bill is a foreign bill, requiring protest both by the law of the state of New York and by the law of the state of Illinois, it is immaterial whether the law of the place of drawing or of the place of payment or dishonor be looked to to determine the content of the drawer's obligation. But if the bill were drawn in New York, and payable and dishonored in a country the law of which did not require protest, the necessity of protest would depend upon the theory of the forum of the action as to whether the law of the place of drawing or that of the place of payment and dishonor should define the drawer's obligation. Upon this question of the conflict of laws the authorities are in conflict. See Minor, Conflict of Laws, pp. 395-398. In *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450 (N. I. L.), it was held that protest was necessary. Under B. E. A. § 72 (subd. 3), it would not be. A bill drawn and payable and dishonored in New York need not be protested to charge the drawer, because by the law of New York, which is both the place of drawing and the place of payment and dishonor, the bill is an inland bill. The necessity of protesting a bill drawn and payable and dishonored in New York, but indorsed in Illinois, in order to charge the indorser, again depends, as in *Amsinck v. Rogers*, supra, upon whether the law of New York or that of Illinois be deemed controlling. By the law of New York the bill is an inland bill, and protest

character as such on its face, or may even purport to be an inland bill, the holder in such cases is given an option to protest it, or to treat it as an inland bill and charge the drawer and indorsers without protesting it.⁸ If an inland bill purport to be a foreign bill, the holder need not, though it seems he may, protest it.⁹

In the case of international foreign bills, a usage of long standing has existed, arising from the difficulty of communication in former times between different nations and the danger of loss in transmission. It is to draw the bill in a set of three or four parts, each a counterpart of the other, except that in each part of the set is incorporated a condition that that particular bill shall be payable only provided all the others remain unpaid. This condition operates as a notice to the acceptor to accept and pay but one bill, and he and the drawer are liable upon but one bill; for it is well-settled law that a payment of one of a set operates as a discharge of the rest. The whole set collectively is deemed to amount to but one bill.¹⁰ The rule that a payee or subsequent indorser, who indorses two or more parts of a bill to separate indorsees, is liable on indorsement to each separate indorsee operates as a check to the improper circulation of the bill.¹¹ The transferor is bound to pass over upon transfer all parts of the bill in his possession, and thus the circulation of these instruments may be effected with safety.¹²

is not required; but by the law of Illinois the bill is a foreign bill, and protest is necessary. According to the doctrine of *Amsinck v. Rogers*, *supra*, protesting would be necessary. Under B. E. A. § 72 (subd. 3), it would not be.

⁸ This is the interpretation of B. E. A. § 4, from which N. I. L. § 129, is copied, suggested by its draftsman. Chalmers, Bills (7th Ed.) 17; Russell, Bills, 104, 105. But see *MacLaren*, Bills (4th Ed.) 85, 86.

⁹ N. I. L. §§ 129, 152 (last sentence); Chalmers, Bills (7th Ed.) 17. See *Lennig v. Ralston*, 23 Pa. 137.

¹⁰ N. I. L. §§ 178, 183; *Caras v. Thalmann*, 138 App. Div. 297, 123 N. Y. Supp. 97 (N. I. L.); *Casper v. Kuhne*, 159 App. Div. 389, 144 N. Y. Supp. 502 (N. I. L.).

¹¹ N. I. L. § 180; *Holdsworth v. Hunter*, 10 Barn. & C. 449. So, if the drawee accepts more than one part, he is liable on each to a bona fide holder. N. I. L. § 181.

¹² *Pinard v. Klockmann*, 8 Best & S. 288, 32 Law J. Q. B. 82. See *Noerr*. B. & N. (4th Ed.)—3

DEFINITION AND FORM OF NOTE

13. A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money.¹⁸

A common form of note is:

New York \$500.00. Buffalo, June 15, 1891.
 Thirty days after date I promise to pay to the order of
 JOHN SMITH Five Hundred Dollars, value received, at
 Bank of Buffalo. THOMAS ROBINSON.

The parties to the foregoing note are technically termed:

- (a) MAKER—The person who signs the note and makes the promise; e. g. (Thomas Robinson.)
- (b) PAYEE—The person in whose favor the promise contained in the note is made; e. g. (John Smith.)

The foregoing are parties to the note in its origin. There are also subsequent parties. They are:

- (a) HOLDER—The person having legal possession of the instrument, who, when it is negotiable, may recover the amount of same. This term includes payee, indorsee, and bearer.
- (b) INDORSER—One who directs the amount of the bill or note to be paid to a person in the indorsement named, or to his order, or to bearer.
- (c) INDORSEE—One who makes title to the instrument through the order specified in the indorsement.

N. I. L. § 182. N. I. L. § 179, provides: "Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the first part presented to him."

¹⁸ See N. I. L. § 184. See, also, p. 29, note 2, supra.

ESSENTIALS OF BILL OR NOTE

14. To be a negotiable bill of exchange or promissory note, the instrument must have the following essential characteristics:

- (a) The bill must contain an order.
- (b) The note must contain a promise.
- (c) The order or promise must be unconditional.
- (d) It must be an absolute order or promise for the payment of money alone.
- (e) The amount of money must be certain.
- (f) The time of payment must be a time certain to arrive.
- (g) The instrument must be specific as to all its parties.
- (h) The instrument must be payable to order or to bearer.¹⁴
- (i) The instrument must be delivered.

¹⁴ N. I. L. §§ 1 (subd. 4), 8. A bill or note not payable to order or to bearer is not negotiable. WESTBERG v. CHICAGO LUMBER & COAL CO., 117 Wis. 589, 94 N. W. 572 (N. I. L.), Moore Cases Bills and Notes, 95; Fulton v. Varney, 117 App. Div. 572, 102 N. Y. Supp. 608 (N. I. L.); GILLEY v. HARRELL, 118 Tenn. 115, 101 S. W. 424 (N. I. L.), Moore Cases Bills and Notes, 7; Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23 (N. I. L.); Exchange Nat. Bank v. Chapline (Ark.) 158 S. W. 151; Quast v. Ruggles, 72 Wash. 609, 131 Pac. 202 (N. I. L.). The N. I. L. does not apply to nonnegotiable bills and notes. WESTBERG v. CHICAGO LUMBER & COAL CO., *supra*; Fulton v. Varney, *supra*; GILLEY v. HARRELL, *supra*; Johnson v. Lassiter, *supra*; Quast v. Ruggles, *supra*; Windsor Cement Co. v. Thompson, 86 Conn. 511, 86 Atl. 1 (N. I. L.); Eades v. Muhlenberg, 157 Ky. 416, 163 S. W. 494 (N. I. L.). Nor, of course, does it apply to instruments which are not non-negotiable bills or notes. The reliance upon the N. I. L. in Sheets v. Coast Coal Co., 74 Wash. 327, 133 Pac. 433, a case involving an instrument possessing none of the formal requisites of a bill or note, was erroneous. The word "order" or "bearer" is not requisite in a negotiable bill or note. Words equivalent by custom—e. g.: "Assigns." Pearson v. Garrett, 4 Mod. 242, *semble*; Murphy v. Arkansas & L. Land & Improvement Co. (C. C.) 97 Fed. 723; Story, Notes, § 44; Daniel, Neg. Inst. § 99. See Porter v. City of Janesville (C. C.) 3 Fed. 617; City of Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809; Brainerd v. New York & H. R. Co., 25 N. Y. 496. Compare Zander v. New York Security & Trust Co., 178

ORDER CONTAINED IN BILL

- 15. An order means any form of words implying a right on the part of the drawer to command, and a corresponding duty on the part of the drawee to make, the payment specified.**

Our purpose here is to illustrate the difference between a mandatory form of words directing payment and a mere request. The theory of a bill of exchange is that the drawer has funds in the hands of the drawee, which he orders or directs to be delivered or paid over to the payee or indorsee of the bill.¹⁵ Hence, where the instrument is so written as to show that the drawer has or attempts to exercise no right to order the money paid, it is not a bill of exchange.¹⁶ To determine whether or not the instrument is so written is, of course, a question purely of the construction of the instrument. Parol evidence cannot be admitted, since, if the bill is to operate as money, the instrument must be pro-

N. Y. 208, 70 N. E. 449, 102 Am. St. Rep. 492 (N. I. L.); *In re Fearing*, 138 App. Div. 881, 123 N. Y. Supp. 396 (N. I. L.). "This note is negotiable." *Raymond v. Middleton*, 29 Pa. 529, *semble*; *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582, *semble*. "Payable on return properly indorsed." *Forrest v. Safety Banking & Trust Co.* (C. C.) 174 Fed. 345 (Pa. N. I. L.)—are sufficient. A bill or note in terms payable to order or bearer is not negotiable, if there be incorporated in it words forbidding its transfer. *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 468; *Tanners Nat. Bank of Catskill v. Lacs*, 136 App. Div. 92, 120 N. Y. Supp. 669 (N. I. L.); *Heaton v. Ainley*, 108 Iowa, 112, 78 N. W. 798, *semble*; *Gazilay v. Riegel*, 16 Pa. Super. Ct. 501, *semble*. Compare *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (N. I. L.). A debtor in the instrument creating a non-transferable common-law obligation may effectually stipulate that the creditor's assignee may enforce the obligation notwithstanding equities between the debtor and the creditor. *Re Blakely Ordnance Co.*, L. R. 3 Ch. App. 154; *Re Natal Imp. Co.*, Id. 355; *Re Romford Canal Co.*, 24 Ch. Div. 91; *Howie v. Lewis*, 14 Pa. Super. Ct. 232. But such a stipulation does not make the obligation negotiable.

¹⁵ *Luff v. Pope*, 5 Hill (N. Y.) 413.

¹⁶ *Edw. Bills & N. § 187; Chit. Bills*, p. 154.

nounced to be a bill or not according to its face.¹⁷ The point to be determined is whether the terms of the instrument, on the one hand, leave compliance or refusal optional, or, on the other hand, amount to an imperative direction. In the former case it is a mere request; in the latter it is a demand, with which the drawee must in common honesty comply, and amounts to the order which is a necessary constituent of a bill of exchange.

We may perhaps make this distinction more clear if we show it as it is laid down in the cases. Among the earliest ones on the point are RUFF v. WEBB¹⁸ and LITTLE v. SLACKFORD.¹⁹ In LITTLE v. SLACKFORD, construing the words, "Please to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. Slackford," Lord Tenterden said: "The fair meaning is, 'You will oblige me by doing it.'"²⁰ In RUFF v. WEBB the words were: "Mr. B. will much oblige Mr. A. by paying C. or order." Lord Kenyon said it was a bill of exchange, because it was an order to pay money. This

¹⁷ In NORRIS v. SOLOMON, 2 MOODY & R. 286, extrinsic evidence was admitted to prove that an instrument in the form of a bill, written at the bottom of a statement of account, whereby the creditor directed the debtor to pay the amount of the statement to a third person, was not intended by the drawer as a bill but as a memorandum of authority. In FIRST NAT. BANK v. GOLDEN, 19 CAL. APP. 501, 126 PAC. 498, a similar ruling was made. But these decisions are erroneous. See 2 AMES CAS. BILLS & NOTES, 827; RUSSELL, BILLS, 27-29. The instrument in each case was clearly a bill. HOYT v. LYNCH, 2 SANDF. (N. Y.) 328; KNEFEL v. FLANNER, 66 ILL. APP. 209; ID., 166 ILL. 147, 46 N. E. 762. See CHICAGO HEIGHTS LUMBER CO. v. MILLER, 219 ILL. 79, 76 N. E. 52, 109 AM. ST. REP. 314.

¹⁸ 1 ESP. 129 (before Lord Kenyon in 1794), MOORE CASES BILLS AND NOTES, 10.

¹⁹ MOODY & M. 171 (before TENTERDEN, C. J., in 1828), MOORE CASES BILLS AND NOTES, 11.

²⁰ But in BIESENTHAL v. WILLIAMS, 62 KY. (1 DUV.) 329, 85 AM. DEC. 629, and REGINA v. TUKE, 17 U. C. Q. B. 296, similar instruments were interpreted to be imperative directions and were held to be bills. In KING v. ELLOR, 1 LEACH, CROWN LAW, 828, it was held that the terms of the following order did not import any compulsion on the part of the drawee to pay, but was simply a request: "Please to send £10 by the bearer, as I am so ill I cannot wait upon you." See 1 LEACH, CROWN LAW, 95, note (a).

case is a strong illustration of construction of words of courtesy as importing an order, but there was nothing in the language used that could not be explained on the score of courtesy. In the former case, on the other hand, the words "Please to let the bearer have" amounted to a mere request for a favor. As the latter case indicates, the fact that the order is expressed in polite words does not impair its mandatory effect.²¹ They may seem a request, yet be in fact an order. Indeed, the presumption is against their being a request, and the courts generally seek to construe the instrument as an order. And, in order to displace the construction that the instrument is a bill, it would seem to require that the language necessarily imported a favor, and was not meant as mere words of civility.²²

Nor is mere authority to pay equivalent to an order. Thus, in HAMILTON v. SPOTTISWOODE,²³ where the words were, "We hereby authorize you to pay on our account to the order of C.," Baron Parke said: "Here is only an option to pay or not; therefore this document is not a bill of exchange, but only a warranty, in case the defendant paid." And in Russell v. Powell,²⁴ where J. M. assigned to the plaintiff a share in the estate of T. H., deceased, in the following instrument: "To the Executors of T. H., deceased—Gents: We do hereby authorize and require you to pay to Mr. Geo. Powell, or his order, £250, being the amount directed by the order of the 29th of July last [an order of court] to be paid to our order. J. M."—it was pointed out that the executors need or need not pay this sum, according to the condition of the estate in their hands, and therefore this was not a bill of exchange.

²¹ Wheatley v. Strode, 12 Cal. 92, 73 Am. Dec. 522; Spurgin v. McPheeeters, 42 Ind. 527.

²² Story, Bills (4th Ed.) § 33, note 6. See note 20, *supra*.

²³ 4 Exch. 200, Moore Cases Bills and Notes, 11. See, also, Robinett v. Bank of Willow Springs (Mo. App.) 163 S. W. 248. But see Nassano v. Tuolumne County Bank, 20 Cal. App. 603, 130 Pac. 29; Sheets v. Coast Coal Co., 74 Wash. 827, 133 Pac. 483 (N. I. L.).

²⁴ 14 Mees. & W. 418.

PROMISE CONTAINED IN NOTE**16. A promise means any form of words from which an intent of the maker to pay can be construed.**

Thus, "Good to C., or order, for \$30 borrowed money," is interpreted to be a promise to pay and a negotiable promissory note.²⁵ "One year after my death I hereby direct my executors to pay to J. H. * * * \$1,976.90, being the balance due him for cash advanced * * * to my son," is a note, since the direction to the maker's executors to pay is as clear an expression of an intention to pay after death as a promise in terms.²⁶ On the other hand, although an instrument contains in terms a promise to pay, another clause may negative the existence of an intention to pay, and preclude the interpretation of the writing as a promissory note.

²⁵ *Franklin v. March*, 6 N. H. 364, 25 Am. Dec. 462; *HUSSEY v. WINSLOW*, 59 Me. 170, Moore Cases Bills and Notes, 13.

²⁶ *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487. In *Block v. Bell* an instrument which ran, "On demand, I promise to pay A. B., or bearer, the sum of £15, for value received," was not signed at the foot, but was addressed in the margin to B., who wrote across it "Accepted," with his signature. It was held that the signature acted as an adoption of the promise, and that the instrument was a promissory note. 1 Moody & R. 149. An "acceptance" on a bill which is incomplete for want of the signature of the drawer makes the writing the promissory note of the person purporting to accept, since the writing expresses his intention to pay in accordance with the terms of the order. *Drummond v. Drummond*, Mor. Dic. 1445. *Tevis v. Young*, 1 Metc. (Ky.) 197, 71 Am. Dec. 474, contra. For the same reason the "acceptor" of a bill, which is incomplete for want of a drawee, constitutes the instrument his promissory note. *PETO v. REYNOLDS*, 9 Exch. 410, Moore Cases Bills and Notes, 67, semble; *Wheeler v. Webster*, 1 E. D. Smith (N. Y.) 1. A bill without a drawee, however, is not only incomplete as a bill, but for want of a promise cannot be interpreted as the note of the drawer. *FORWARD v. THOMPSON*, 12 U. C. Q. B. 103, Moore Cases Bills and Notes, 71. But the few cases in the United States on the point have enforced such a bill against the drawer upon a false analogy to an instrument in which the same person is both drawer and drawee. *ALMY v. WINSLOW*, 126 Mass. 342, Moore Cases Bills and Notes, 72; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 186; *Didato v. Coniglio*, 50 Misc. Rep. 280, 100 N. Y. Supp. 466 (N. I. L.).

For example, a provision in an instrument otherwise in the form of a note, made by a corporation, that it should in no way be a charge upon the property of the maker, since it *expressly* deprives the paper of any effect in creating a legal obligation, prevented the writing as a whole from disclosing an intention to pay.²⁷

A mere admission that a debt is due, which can be treated on a trial only as so much proof tending to establish a debt, is a very different thing from the promise required for a promissory note. A promissory note is a new obligation, and not simply evidence of an old obligation. An acknowledgment of indebtedness is evidence of an old obligation, but creates no new obligation. In such terms as "Due C., \$100, value received," "I O U \$100," "Borrowed, this day, of H. £100,"²⁸ "I acknowledge the within note to be just and due"²⁹ there is no liability that is new, assumed by the persons who signed these instruments. They are mere memoranda relating to a financial transaction, without any implication in words of a promise to pay.

But if a writing, in addition to an acknowledgment of indebtedness, contains words which can be interpreted as an expression of intention to pay the debt, the instrument may be a note, notwithstanding the informality in the expression of the promise. Thus, in the words, "I do acknowledge

²⁷ *Heflin Gold Mining Co. v. Hilton*, 124 Ala. 365, 27 South. 301. Compare *Hickok v. Bunting*, 67 App. Div. 560, 73 N. Y. Supp. 967 (N. I. L.). See p. 54, note 60, *infra*.

²⁸ *Currier v. Lockwood*, 40 Conn. 349, 16 Am. Rep. 40; *GAY v. ROOKE*, 151 Mass. 115, 23 N. E. 835, 7 L. R. A. 392, 21 Am. St. Rep. 434, *Moore Cases Bills and Notes*, 14; *Fisher v. Leslie*, 1 Esp. 426; *Hyne v. Dewdney*, 21 Law J. 278.

²⁹ *Gray v. Bowden*, 23 Pick. (Mass.) 282. In *Taylor v. Steele* an action was brought on the following instrument: "Received from Mrs. Barbara Taylor the sum of £170, for value received, for which I promise to pay at the rate of £5 per cent. from the above date." The following opinion was delivered by Parke, B.: "This document is not a promissory note, because it contains no promise to pay the principal, but only the interest. * * * I agree that an actual promise is not necessary if there are words in the instrument from which a promise to pay can be collected." 16 Mees. & W. (1847) 665. For the same reason, a certificate of deposit, which, after certifying to a

myself to be indebted to A. in £50, to be paid on demand,"²⁰ the words "to be paid" were deemed a promise to pay; and the words, "I O U £20, to be paid on the 22d inst.," were held to import a promise for the same reason.²¹ Similarly, the more elliptical expression "Due A. \$94, on demand," is a promise, because the sense requires the words "to be paid" to be supplied before "on demand."²² The words "John Mason, 14th Feb., 1836, borrowed of Ann Mason, his sister, the sum of £14 in cash as per loan, in promise of payment of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother,"

credit of \$5,000, continued, "This amount is left on deposit in this bank with the understanding that it is not to be withdrawn for two years, * * * in consideration of which we hereby agree to pay I. straight interest at the rate of 7%," was held not a promissory note. *YOUNG v. AMERICAN BANK*, 44 Misc. Rep. 305, 89 N. Y. Supp. 913 (N. I. L.), *Moore Cases Bills and Notes*, 19.

²⁰ *Casborne v. Dutton*, Selw. N. P. 329; *STAGG v. PEPOON*, 1 Nott & McC. (S. C.) 102, *Moore Cases Bills and Notes*, 18; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590.

²¹ *Brooks v. Elkins*, 2 Mees. & W. 74. The same interpretation of a bank's certificates of deposit, which acknowledge the receipt of a deposit of money and state that the sum deposited is "payable" to a designated person, results in their recognition as promissory notes. *Miller v. Austen*, 13 How. (U. S.) 218, 14 L. Ed. 119; *HATCH v. FIRST NAT. BANK*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401, *Moore Cases Bills and Notes*, 49; *YOUNG v. AMERICAN BANK*, 44 Misc. Rep. 308, 89 N. Y. Supp. 915 (N. I. L.), *Moore Cases Bills and Notes*, 21; *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171 (N. I. L.); *Pryor v. Bank of America*, 240 Ill. 100, 88 N. E. 288 (N. I. L.); *Forrest v. Safety Banking & Trust Co.* (C. C.) 174 Fed. 345 (N. I. L.); *Dickey v. Adler*, 143 Mo. App. 326, 127 S. W. 593 (N. I. L.). See *Beckstrom v. Krone*, 125 Ill. App. 376. If words of negotiability are added to an acknowledgment of indebtedness, e. g., "Due I. H. or order \$100," the instrument, it seems, is a promissory note. It may be said that, since one cannot admit the existence of a common-law debt due to the order of the creditor, the words "or order" must be disregarded unless the instrument is interpreted as "Due I. H. \$100, to be paid him or order." See *Daniel, Neg. Inst.* § 38; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Russell v. Whipple*, 2 Cow. (N. Y.) 538; *Marrigan v. Page*, 4 Humph. (Tenn.) 247; *HUYCK v. MEADOR*, 24 Ark. 191, *Moore Cases Bills and Notes*, 16.

²² *Smith v. Allen*, 5 Day (Conn.) 337. But see *Purtel v. Morehead*, 19 N. C. 239.

were held to constitute a promise,⁸⁸ because they stated an advance of a loan of money, which the court thought was expressly, though clumsily, undertaken to be paid. The expressions of gratitude were treated as mere redundancy. In some jurisdictions there are, it is true, decisions holding that the word "due" imports a promise;⁸⁹ but they are against the weight of authority, and not to be supported on principle.⁹⁰ The true question before the court in construction should be the intention of the signer, to be gathered from any form of words in the instrument itself, to assume and pay as a distinctly new obligation.

CERTAINTY AS TO THE TERMS OF THE ORDER OR PROMISE

17. A bill or note must be payable absolutely and at a time certain.

EXCEPTION—If the instrument be payable upon the happening of an event which is certain to happen, though the time when it will happen be uncertain, the instrument is negotiable.

18. The instrument must not be payable out of any particular fund.

DISTINCTION—Indicating to a drawee a source or fund out of which he may be reimbursed is not charging payment upon a particular fund.

19. Instruments payable on demand, or at sight, or on a fixed period after demand or sight, or one in which no time is expressed, which is equivalent to an instrument payable on demand, are payable absolute-

⁸⁸ Ellis v. Mason, 7 Dowl. 598.

⁸⁹ Anderson v. Pearce, 36 Ark. 293, 38 Am. Rep. 39; St. Louis, I. M. & S. Ry. Co. v. Camden Bank, 47 Ark. 545, 1 S. W. 704; Brady v. Chandler, 31 Mo. 28. By statute in some states due bills are put on the same footing as promissory notes. See, for example, Jacquin v. Warren, 40 Ill. 459; Lee v. Balcom, 9 Colo. 216, 11 Pac. 74.

⁹⁰ See Daniel, Neg. Inst. §§ 35-40.

ly and are sufficiently certain as to time of payment.

20. An instrument payable in installments, even though it provides that upon non-payment of an installment the whole becomes due, is a negotiable instrument.

Certainty in General

A negotiable instrument cannot be conditional in its terms, but must be absolute upon its face. Conditions written upon its face would be inconsistent with its service either as an instrument of exchange, or as an instrument of credit, or as a substitute for money as a medium of payment or circulation. "The policy," said Lord Chief Baron Eyre,⁸⁶ "which instituted this simple instrument demands that the simplicity of it should be protected."

Illustration of Uncertainty as to Event

Orders and promises where it is uncertain from the inspection of the instrument that the day or event of payment is ever to arrive are therefore not bills or notes.⁸⁷ The case of Beardesley v. Baldwin⁸⁸ is an example. That was a promise to pay money so many days "after the defendant should marry." This is briefly reported as not being negotiable within the statute. Another instance is Braham v. Bubb,⁸⁹ which was a promise to pay "four years after date, if I am then living." Abbott, C. J., said: "It is contingent whether the note will ever be payable, for, if the maker should die within the four years, no payment is to be made."⁹⁰ These will perhaps suffice to illustrate the point that such instruments contain a promise so indefinite that, for

⁸⁶ Gibson v. Minet, 1 H. Bl. 618.

⁸⁷ N. I. L. §§ 1 (subd. 2), 4 (last sentence).

⁸⁸ 2 Strange, 1151.

⁸⁹ MS. Trin. Term, 1828, Middlesex (cited in Chitty, Bills, *135, note).

⁹⁰ In Richardson v. Martyr, 25 Law T. 64, it was held that, where demand on a note must be made during the lifetime of the payee, the undertaking was conditional, and did not, therefore, constitute a promissory note. See, also, De Wald's Estate, 18 Phila. (Pa.) 251. The dictum contra in Miller v. Slater, 154 Wis. 35, 142 N. W. 124 (N. I. L.), is erroneous. 2 Ames Cas. B. & N. 828.

business purposes, it hardly amounts to a promise at all.⁴¹ It can certainly have no definite value. Hence the reason of the rule that such instruments are non-negotiable, because

⁴¹ EXPRESS CONDITIONS.—*Additional Illustrations.*—The following are conditional clauses which have been held to prevent instruments otherwise in the form of bills or notes from attaining a status as such: "When he is 21 years old," KELLEY v. HEMMINGWAY, 13 Ill. 604, 56 Am. Dec. 474, Moore Cases Bills and Notes, 22; Rice v. Rice, 43 App. Div. 458, 60 N. Y. Supp. 97; "Subject to any offset that may arise for repairs," Jones v. Laturnus (Tex.) 40 S. W. 1010; "This note * * * is not to be paid unless I have the use of said premises," Jennings v. First Nat. Bank, 13 Colo. 417, 22 Pac. 777, 16 Am. St. Rep. 210; "If elected county commissioner," Specht v. Beindorf, 56 Neb. 553, 76 N. W. 1069, 42 L. R. A. 429; "On presentation of certificate No. 32,004 issued by K. & L. of S. to J. K., properly released," National Council of Knights and Ladies of Security v. Hibernian Banking Ass'n, 137 Ill. App. 175; "On failure on our part to comply with a certain contract, * * * and the further condition that the F. & D. Co. * * * have become legally liable on said bond," Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas, 48 Tex. Civ. App. 301, 108 S. W. 782; "Payable when we get it from the brewery after date," Wray v. Miller (Sup.) 120 N. Y. Supp. 787 (N. I. L.); "Subject to conditions of contract," Titlow v. Hubbard, 63 Ind. 6; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; Re Boyse, 33 Ch. Div. 612 (B. E. A.), *semile;* Littlefield v. Hodge, 6 Mich. 326, *contra.* The phrase "subject to contract" does not make a bill or note conditional. It does, however, give notice of the collateral agreement, and has been held to effect an incorporation into the bill or note of the collateral writing, if any, referred to. See pages 114, 115, *infra.* Such phrases as "as per memo of agreement," "in accordance with contract," "pursuant to written order," "given in connection with contract," "in compliance with vote of company," "according to letter," do not make a bill or note conditional, but operate simply as notice of the agreement, etc. See pages 114, 115, *infra.* For other examples of contingent orders and promises, see Corbett v. State, 24 Ga. 287; Husband v. Eppling, 81 Ill. 172, 25 Am. Rep. 273; Pearson v. Garrett, 4 Mod. 242; Palmer v. Pratt, 2 Bing. 185; Coolidge v. Ruggles, 15 Mass. 387; De Forest v. Frary, 6 Cow. (N. Y.) 151; Grant v. Wood, 12 Gray (Mass.) 220.

Voucher Checks.—An order otherwise in the form of a check ordering payment to be made, "provided the receipt at foot hereof is duly signed," is not a negotiable instrument. Bavins v. London Bank [1900] 1 Q. B. 270, 275 (B. E. A.); Gordon v. London Bank [1902] 1 K. B. 242, 245, 275, 282 (B. E. A.); Val Blatz Brewing Co. v. Inter-State Ice & Cold Storage Co., 161 Mo. App. 531, 143 S. W. 542 (N. I. L.). But the memorandum on a check, "The receipt at back hereof must be signed,"

uncertain. It would be unwise, from a business point of view, to allow such conditions to be incorporated in instruments which are to serve as a circulating medium.

has been held not to be a condition attached to the order addressed to the drawee bank, but to be a direction addressed to the payee, non-compliance with which would not authorize the drawee bank to refuse payment. *Nathan v. Ogdens*, 93 L. T. R. (N. S.) 553 (B. E. A.). In *White v. Cushing*, 88 Me. 339, 34 Atl. 184, 32 L. R. A. 590, 51 Am. St. Rep. 402, however, the sentence, "The bank book of the depositor must accompany this order," written at the bottom of an instrument otherwise in the form of a check, was interpreted to make the duty of payment by the bank conditional upon the production of the bank book, and to prevent the instrument from being a check. See *First Nat. Bank of San Francisco v. Golden*, 19 Cal. App. 501, 126 Pac. 498. A voucher check such as that before the court in *Bavins v. London Bank*, *supra*, *Gordon v. London Bank*, *supra*, and *Val Blatz Brewing Co. v. Inter-State Ice & Cold Storage Co.*, *supra*, should be distinguished from a bill, note, or check drawn on a printed blank which contains a statement of the condition, e. g., countersigning, upon which the instrument drawn upon it shall have its inception as an obligation. The maker or drawer of such a potential bill or note is, of course, not chargeable upon it until compliance with the condition gives the instrument an inception. *Berenson v. London & Lancashire Fire Ins. Co. of Liverpool*, Eng., 201 Mass. 172, 87 N. E. 687 (N. I. L.); *Germain Co. v. Bank* (Ga. App.) 80 S. E. 302, *semble*. But the promise or order in the writing speaks from the inception of the instrument, and is unconditional from the moment it becomes operative. From its inception as an obligation, therefore, the instrument is a bill or note, and the maker or drawer is obligated as such. *Brown v. Cow Creek Sheep Co.* (Wyo.) 126 Pac. 886 (N. I. L.). See *Smith v. Clopton*, 4 Tex. 109; *Parsons v. Jackson*, 99 U. S. 434, 438, 440, 25 L. Ed. 457; *Cudahy Packing Co. v. Sioux Nat. Bank*, 75 Fed. 473, 21 C. C. A. 428. The drawer or maker of a conditional order or promise cannot, however, be charged as the drawer or maker of a bill or note, even upon the happening of the condition, because a bill or note, from its inception must be unconditional. N. I. L. § 4 (last sentence); *Kingston v. Long*, 4 Doug. 9; *Bayley, Bills* (6th Ed.) 16; *Joseph v. Catron*, 13 N. M. 202, 81 Pac. 439, 1 L. R. A. (N. S.) 1120; *Neyens v. Port*, 46 Pa. Super. Ct. 428, 433, 434 (N. I. L.), *semble*; *Equitable Trust Co. of New York v. Howe*, 72 Misc. Rep. 46, 129 N. Y. Supp. 112 (N. I. L.), *semble*. But the recent cases disclose a tendency to nullify this principle by interpreting, wherever possible, the condition as a condition to the inception of the instrument rather than as a condition to the order or promise. See *Berenson v. London & Lancashire Fire Ins. Co. of Liverpool*, Eng., *supra*; *Val Blatz Brewing Co. v. Inter-State Ice & Cold Storage*

Certainty as to Event, Uncertainty as to Time

The rule laid down by the courts that no order or promise from the terms of which it is manifestly uncertain that the

Co., *supra*; *Brown v. Cow Creek Sheep Co.*, *supra*; *Nassano v. Toulumne*, 20 Cal. App. 603, 130 Pac. 29.

Implicit Conditions.—A condition, though not expressed in terms, may be implicit in the language expressing the order or promise. Such a condition is equivalent to an express condition and prevents the instrument from attaining the status of a bill or note. Thus, a written promise to pay the debt of another may be interpreted as a guaranty; i. e., a promise conditional upon the default of the principal debtor. In *Jarvis v. Wilkins*, 7 M. & W. 410, upon this interpretation, the following was held not to be a note: "I undertake to pay R. J. the sum of £6 for a suit of clothes ordered by D. P." In *Bradt v. Krank*, 184 N. Y. 515, 58 N. E. 657, 79 Am. St. Rep. 662 (N. I. L.), for the same reason the following was held not to be a note: "We, the undersigned, J. K. and J. L. M., hereby agree to pay D. B., B. & Co. a bill of \$265.50 against C. & J. between now and Tuesday next." Similarly, the statement in an instrument otherwise in the form of a note that it is given as collateral security for another obligation has resulted in an interpretation that the promise is conditional upon default in performance of the obligation secured. *Costello v. Crowell*, 127 Mass. 283, 34 Am. Rep. 367; *Id.*, 134 Mass. 280, 285; *American Nat. Bank v. Sprague*, 14 R. I. 410; *Greenbrier Valley Bank v. Bair*, 71 W. Va. 684, 77 S. E. 274; *Heaton v. Ainsley*, 108 Iowa, 112, 78 N. W. 798, *semble*. It is implicit in an offer that it is not binding, i. e., not to be performed, until acceptance. Consequently, an instrument in which the promise is in the form of an offer looking to a unilateral contract, e. g., "Please ship to L. E. P., station Huntington, Pa., goods as follows: * * * Total, \$137. * * * 180 days after date I, we, or either of us, promise to pay A. or order \$137. [Signed] L. E. P."—discloses a conditional promise, and is not a note. *Neyens v. Port*, 46 Pa. Super. Ct. 428 (N. I. L.); *State v. Mitton*, 37 Mont. 366, 98 Pac. 926, 127 Am. St. Rep. 732 (N. I. L.); *Hovorka v. Hemmer*, 108 Ill. App. 443, *semble*; *Neyens v. Hosack*, 142 Ill. App. 327, *semble*; *Harvey v. Dimon*, 36 Pa. Super. Ct. 82 (N. I. L.), *semble*; *Equitable Trust Co. v. Harger*, 258 Ill. 615, 102 N. E. 209. See, also, *Equitable Trust Co. v. Taylor*, 146 App. Div. 424, 131 N. Y. Supp. 475 (N. I. L.); *Same v. Newman*, 146 App. Div. 953, 131 N. Y. Supp. 1113 (N. I. L.); *Same v. Were*, 74 Misc. Rep. 469, 132 N. Y. Supp. 351 (N. I. L.). But the fact that the note, by stating on its face the promise of the payee which was the consideration for the maker's promise to pay, discloses what appears to be a bilateral contract, in which performance by the payee might be a condition precedent or concurrent *implied in law* to the maker's promise, does not make the maker's obligation either expressly or im-

money will ever be paid can be a negotiable instrument, is undoubtedly wise. As much cannot be said for the rule laid down in contradistinction to it, in another aspect of

plicitly conditional, and does not deprive the instrument of its status as a note. The "implication" of a condition in a contract is the allowance on equitable grounds of the defense of non-performance by the plaintiff of his part of the contract. It is not the finding of a condition by interpreting the expressions of the parties. Since a "condition" implied in law, therefore, is not a condition in fact, the statement of an unperformed promise by the payee as the consideration does not make the promise appearing on the face of the note conditional. Siegel Cooper Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51; First Nat. Bank of Salisbury v. Michael, 96 N. C. 53, 1 S. E. 855; Chase v. Behrman, 10 Daly (N. Y.) 344; Mable v. Johnson, 8 Hun (N. Y.) 309; Crawford v. Johnson, 87 Mo. App. 478; Simmons v. Council, 5 Ga. App. 386, 63 S. E. 238; Russell, Bills, 66, 67. Contra: Howard v. Kimball, 65 N. C. 175, 6 Am. Rep. 739, semble (disapproved in Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989); Post v. Kinzua Hemlock Ry. Co., 171 Pa. 615, 33 Atl. 362. Nor is the statement on the face of the note of such a promise notice to a purchaser of the equitable defense the maker would have against the payee in case of his non-performance. Siegel, Cooper Co. v. Chicago Trust & Savings Bank, *supra*; First Nat. Bank v. Michael, *supra*; Chase v. Behrman, *supra*; Mable v. Johnson, *supra*; Simmons v. Council, *supra*. The following cases, where, however, the payee's promise did not appear on the note, but was known to the plaintiff at the time of his purchase, are to the same effect: McNight v. Parsons, 136 Iowa, 398, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665 (N. I. L.); Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989; Moyes v. Bell, 62 Wash. 534, 114 Pac. 193 (N. I. L.). Compare Zebley v. Sears, 38 Iowa, 507. Even if the time for performance by the payee appears to have passed the statement is not constructive notice of a default, if any, on his part. Mable v. Johnson, 8 Hun (N. Y.) 309. It is even clearer that the statement in a note of the property or act for which it is given does not make the note conditional. Such a statement either is an intimation of a promise to transfer a right in respect of the property, or to perform the act mentioned, upon which interpretation the case is that just discussed; or it is a statement of the right or act which the maker has received as consideration and will not admit the interpretation that the maker's promise is conditional upon its performance. Duncan v. City of Louisville, 13 Bush (76 Ky.) 378, 26 Am. Rep. 201; Bank of Guntersville v. Jones Cotton Co., 156 Ala. 525, 46 South. 971; Waddell v. Hanover Bank, 48 Misc. Rep. 578, 97 N. Y. Supp. 305 (N. I. L.); Equi-

this same point. Where the time of payment is certain to arrive, although the precise time be uncertain, the courts consider the element of uncertainty which destroys negotia-

table Trust Co. v. Taylor, 146 App. Div. 424, 131 N. Y. Supp. 475 (N. I. L.); Same v. Newman, 146 App. Div. 953, 131 N. Y. Supp. 1113 (N. I. L.); Gilbert v. Adams, 146 App. Div. 864, 131 N. Y. Supp. 787 (N. I. L.); First Nat. Bank of Snohomish v. Sullivan, 66 Wash. 375, 119 Pac. 820, Ann. Cas. 1913C, 930 (N. I. L.); Dollar Saving & Trust Co. v. Crawford & Ashby, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587. Nor is such a statement notice to a purchaser of defenses, if any, of the maker based upon defects in title, quantity, quality, or sufficiency of the property or performance. Duncan v. City of Louisville, *supra*; Waddell v. Hanover Bank, *supra*; Bank of Guntersville v. Jones Cotton Co., *supra*; Dollar Saving & Trust Co. v. Crawford & Ashby, *supra*. Since the statement in a bill or note of a promise or of a performance as the consideration does not make the instrument conditional, it follows that "chattel notes," or "title-retaining notes," are not conditional. Such notes either evidence a sale to the maker of the property for which the note is given and an attempt to give the payee a lien upon it as security, i. e., they state the performance for which the note was given, or they evidence a promise to transfer title upon payment of the note, i. e., they state the promise for which the note was given. Under either interpretation, then, such instruments are unconditional, and in the absence of other objection are valid promissory notes. Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100; Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277; Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524 (N. I. L.); Third Nat. Bank of Buffalo v. Bowman-Spring, 50 App. Div. 66, 63 N. Y. Supp. 410; Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214 (N. I. L.); Gilpin v. People's Bank, 45 Ind. App. 52, 90 N. E. 91; First Nat. Bank of Lineville v. Alexander, 161 Ala. 580, 50 South. 45; First Nat. Bank of Richmond, Ind., v. Badham, 86 S. C. 170, 68 S. E. 536, 138 Am. St. Rep. 1043; Ex parte Bledsoe (Ala.) 61 South. 813 (N. I. L.); Exchange Nat. Bank v. Steele (Ark.) 158 S. W. 960. Contra: Sloan v. McCarty, 134 Mass. 245; Third Nat. Bank of Syracuse v. Armstrong, 25 Minn. 530; Gazlay v. Riegel, 16 Pa. Super. Ct. 501; Worden Grocer Co. v. Blanding, 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1332 (N. I. L.); Fleming v. Sherwood, 24 N. D. 144, 139 N. W. 101, 43 L. R. A. (N. S.) 945 (N. I. L.). See Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126 (N. I. L.). The intimations in some of the cases sustaining the validity of "chattel notes," e. g., Choate v. Stevens, *supra*, that if the instrument before the court disclosed a promise to transfer title upon payment by the maker, and not a

bility to be eliminated.⁴² This rule originated in two cases, followed in other jurisdictions, but of doubtful authority to-day in England, the jurisdiction of their origin.⁴³ These cases are Andrews v. Franklin⁴⁴ and Colehan v. Cooke.⁴⁵

transfer of title with a reservation of lien until payment, the note would be conditional, were unnecessary to the decisions and are not in accord with the cases already cited. Siegel, Cooper Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51; First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855; Chase v. Behrman, 10 Daly (N. Y.) 344; Mable v. Johnson, 8 Hun (N. Y.) 309; Simmons v. Council, 5 Ga. App. 386, 63 S. E. 238. See Russell, Bills, 66, 67. These intimations, however, have led the Supreme Court of Michigan to draw the distinction suggested. Warden Grocer Co. v. Blanding, *supra*. In Kansas "chattel notes" have not been recognized as promissory notes on the ground that they contain a promise by the maker to do an act other than the payment of money. South Bend Iron-Works Co. v. Paddock, 37 Kan. 510, 15 Pac. 574. See Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237 (N. I. L.). N. I. L. § 3 (subd. 2), seems to be an attempt to codify the doctrine that the statement of the consideration does not make a bill or note conditional. Crawford, Anno. N. I. L. (3d Ed.) pp. 11, 12. See discussion of Professor Ames, Judge Brewster, and Mr. McKeehan in Brannan, Anno. N. I. L. (2d Ed.) pp. 6, 165, 166, 180, 181, 194, 195, 224-227.

⁴² N. I. L. § 4.

⁴³ See 2 Ames Cas. Bills & N. 831, citing Alexander v. Thomas, 16 Q. B. 333, and Macarthur v. Fulkerton, Mor. Dict. 1408. The doubt as to Colehan v. Cooke, *infra*, has been dissipated by B. E. A. § 11 (subd. 2).

⁴⁴ 1 Strange, 24. Accord: Evans v. Underwood, Willes, 262, on the point that the time of paying off a ship (one of his majesty's) is certain to arrive, and that therefore a bill or note payable upon the happening of such an event is sufficiently certain. These cases are erroneously decided. In Joseph v. Catron, 13 N. M. 202, 81 Pac. 439, 1 L. R. A. (N. S.) 1120, the following instrument, payable upon the performance by the United States of a moral obligation, was held not

⁴⁵ Willes, 393. A note payable at or after the death of the maker or another is sufficiently certain. Shaw v. Camp, 160 Ill. 425, 43 N. E. 608; Crider v. Shelby (C. C.) 95 Fed. 212; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424; Hege-man v. Moon, 131 N. Y. 462, 30 N. E. 487; Beatty's Estate v. Western College of Toledo, Iowa, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242; McClenathan v. Davis, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017; Dorsey v. Hudmon (Ala.) 60 South. 303. See Nassano v. Toulumne, 20 Cal. App. 603, 130 Pac. 29.

The instrument in Andrews v. Franklin was a promise to pay within two months after a certain ship was paid off, and was held to be negotiable as a note because paying off the ship was a thing of a public nature, and certain to arrive. In Colehan v. Cooke the instrument was a promise to pay ten days after the death of the maker's father—an event also certain to arrive. In this last case Lord Chief Justice Willes said: That a note, to be within the statute of Anne, need be only an express promise to pay to another or his order, or to bearer, "but as to the time of payment, the act is silent"; that there was no limited time beyond which if bills of exchange were made payable they were not good; and that "if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill." This is probably the generally accepted doctrine at the present day. Says Judge Pierpont in Capron v. Capron:⁴⁸ "As long as the payment is certain, and the

a promissory note: "Upon the confirmation by Congress of the U. S. of the certain land grant known as the Cañon de Chama, otherwise called * * *, I promise to pay Mr. S. E. or order the sum of \$500 in current funds of the U. S. [Signed] A. J." The court said of Andrews v. Franklin and Evans v. Underwood (13 N. M. 219, 81 Pac. 444): "Wherever these two cases have been cited * * * it has been to question their soundness. Indeed, doubts have been expressed as to whether Andrews v. Franklin was ever actually decided, and Evans v. Underwood has been particularly criticised upon the ground that, while the paying off of a public ship may be a moral certainty, it is by no means to be considered equally certain that a particular person will receive wages therefrom. For reference to these cases, see 1 Dan. Neg. Inst. § 46; Story on Prom. Notes, § 27; Chitty on Bills, p. 137; Bayley on Bills, p. 26; Weidler v. Kauffman, 14 Ohio, 456." See, also, Russell, Bills, 99, 100.

⁴⁸ 44 Vt. 412. An interpretation which it is difficult to justify has resulted in holding notes payable at the convenience of the maker sufficiently certain as to time of payment. Thus in Smithers v. Junker it was held that a note made payable at the convenience of the maker, in the following language: "For value received, I promise to pay to S. F. S. \$2,048.25, payable at my convenience, upon this express condition: That I am to be the sole judge of such convenience and time of payment"—is payable within a reasonable time. (C. C.) 41 Fed. 101, 7 L. R. A. 264; Johns. Cas. Bills & N. 21. A similar result was reached in Jones v. Eisler, 3 Kan. 134; Brown v. Cruse, 90 Kan. 306, 133 Pac. 865 (N. I. L.); Works v. Hershey,

uncertainty is only as to the length of time to be given, this uncertainty the law makes certain by giving a reasonable time after the time prescribed to make payment." This decision was rendered upon a note in terms: "I promise to pay A. B., or bearer, \$75, one year from date, with interest annually; and, if there is not enough realized by good management in one year, to have more time to pay." So in *Cota v. Buck*,⁴⁷ a note to be paid "in the course of the season now coming" was negotiable because the date of payment must come by mere lapse of time. Professor Ames makes a most apposite criticism of the foregoing rule. "Nothing," says he, "could be more inconsistent with the negotiability of a bill or note than that the holder should have to be continually on the alert to ascertain the precise day when they should become payable, in order to charge the drawer or indorser. Furthermore, it is impossible to attach a definite value to anything so speculative in its nature as an obligation payable, as in *Colehan v. Cooke*, so many days after the death of J. S."⁴⁸

⁴⁵ Iowa, 340; *Page v. Cook*, 164 Mass. 116, 41 N. E. 115, 28 L. R. A. 759, 49 Am. St. Rep. 449. Contra: *Alexander v. Thomas*, 16 Q. B. 333. Compare *Citizens' Nat. Bank v. Piollet*, 126 Pa. 194, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860.

⁴⁷ 7 Metc. (Mass.) 588, 41 Am. Dec. 464. In *Miller v. Poage*, 56 Iowa, 96, 8 N. W. 799, 41 Am. Rep. 82, an order in the following form: "One year after date I promise to pay to A. or order \$100. * * * If this agent does not sell enough in one year, one more is granted"—was held not negotiable. The court construed the note as payable only out of a particular fund until expiration of two years, and nonnegotiable, because not negotiable when issued. But in *State Bank of Halstad v. Bilstad* (Iowa) 136 N. W. 204, *Miller v. Poage* was in effect overruled, the court holding a note payable on December 1st, or one year later if the crop on certain land fell "below eight bushels an acre," sufficiently certain as to time of payment, and not payable out of a particular fund.

⁴⁸ 2 Ames Cas. Bills & N. p. 831. Professor Ames continues (p. 831): "Neither of the objections just suggested applies to a note payable, at the option of the maker, on or before a fixed day; and such a note is negotiable." N. I. L. § 4 (subd. 2); *Jordan v. Tate*, 19 Ohio St. 586; *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197; *First Nat. Bank of Springfield v. Skeen*, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; *Gill v. First Nat. Bank* (Tex.) 47 S. W. 751; *LEADER v. PLANTE*, 95 Me. 339, 50 Atl. 53, 85 Am. St. Rep. 418, Moore Cases

Payment out of Particular Fund

There is another class of common instruments which the courts have deemed obnoxious to the rule requiring bills and notes to be payable absolutely. They are those where a person, for value, has sought to transfer some particular property or right by an instrument which has much the form of a bill or note. They empower the payee to collect moneys of the drawee or maker, which are coming from some particular fund or source. They are not orders or promises to pay in any event.⁴⁹ Thus in *Jenney v. Herle*⁵⁰ the court said: "It would be very mischievous to make such notes as these, which are but appointments, bills of exchange; for, at that rate, if a tradesman applies to a gentleman for money for his bill, says the gentleman, 'I will direct my steward to pay you,' and writes to him, 'Pay to J. S. the money mentioned in this bill out of the rents in your

Bills and Notes, 24; *Cowing v. Cloud*, 16 Colo. App. 326, 65 Pac. 417; *Dorsey v. Hudmon* (Ala.) 60 South. 303. Contra: *Stults v. Silva*, 119 Mass. 137; *Pierce v. Talbot*, 213 Mass. 330, 100 N. E. 553. See, also, *Porter v. Wold*, 34 Okl. 253, 127 Pac. 432. The law of Massachusetts on this point, however, was brought in accord with that of the other states even before the enactment of the N. I. L., by chapter 329, Laws 1888. *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 382, 87 N. E. 363. Chapter 329 was repealed when the N. I. L. was adopted. Laws 1898, c. 533; R. S. 1902, c. 227, p. 1930. As to the present status of such notes made in Massachusetts between 1888 and 1898, see *Pierce v. Talbot*, supra. Notes which give the maker the option of paying such part of the amount as he chooses, as well as the whole, at such time or times before maturity as he desires, or at stated periods, e. g., interest days, are held to be valid. *Cooke v. Horn*, 29 L. T. R. (N. S.) 369; *Riker v. A. & W. Sprague Mfg. Co.*, 14 R. I. 402, 51 Am. Rep. 413; *Bowie v. Hume*, 13 App. D. C. 286; *Turpin v. Gresham*, 106 Iowa, 187, 76 N. W. 680; *Greenwood Lodge No. 135, Ancient & Accepted Masons, v Priebatsch*, 88 Miss. 120, 35 South. 427; *Crowe v. Beem*, 36 Ind. App. 207, 75 N. E. 302; *Kinsel v. Ballou*, 151 Cal. 754, 91 Pac. 620; *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N. W. 157 (N. I. L.), semble.

⁴⁹ N. I. L. § 3 (last sentence).

⁵⁰ 2 Ld. Raym. 1361, and see *Dawkes v. Lord De Lorane*, 3 Wils. 207, 2 W. Bl. 782; *Carlos v. Fancourt*, 5 Term R. 482; *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Morton v. Naylor*, 1 Hill (N. Y.) 583; *Gallery v. Prindle*, 14 Barb. (N. Y.) 186; *Wadlington v. Covert*, 51 Miss. 631; *Bayerque v. City of San Francisco*, 1 McAll. 175, Fed. Cas. No. 1,137.

hands.' The steward has no rents in his hands. It can never be imagined the gentleman should be liable to be sued upon this as upon a bill of exchange." And the court accordingly refused to consider the instrument before them a bill of exchange, and considered it a "bare appointment to pay money out of a particular fund." The modern doctrine is the same. In *Munger v. Shannon*⁵¹ the question was concerning this instrument: "Mr. Shannon: You will please pay to W. & H. the amount of \$2,000, and deduct the same from my share of profits of our partnership." This was formally accepted. Dwight, C., said of this:⁵² "A bill must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee is reimbursed. The true test is whether the drawee is confined to the particular fund, or whether, though a particular fund is mentioned, the drawee may charge the bill up to the general account of the drawer if the designated fund turn out to be insufficient. It must appear that the bill of exchange is drawn on the general credit of the drawer.⁵³ It must carry with it the personal credit of the drawer, not confined to any fund. It is upon the credit of a person's hand as on the hand of the drawer, the indorser, or the person who negotiates it." Instances of the above principle are an order of A. upon B. to pay a certain sum "out of money in his hands belonging to me,"⁵⁴ or when the paper was expressed as payable "out

⁵¹ 61 N. Y. 251. See, also, *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138 (N. I. L.).

⁵² 61 N. Y. 255.

⁵³ *Dawkes v. Lord De Lorane*, 3 Wils. 213; *Josselyn v. Lacier*, 10 Mod. 294.

⁵⁴ *Averett's Adm'r v. Booker*, 15 Grat. (Va.) 165, 76 Am. Dec. 203; *Tisdale Lumber Co. v. Piquet*, 153 App. Div. 266, 137 N. Y. Supp. 1021 (N. I. L.). In *National Sav. Bank v. Cable*, 73 Conn. 568, 48 Atl. 428 (N. I. L.), an order directing a bank to pay J. C. or order "\$300, or what may be due on my deposit book, No. E632," was ruled not a check. The court said: "It is not negotiable. It is payable out of a particular fund. * * * The amount to be paid is made to depend upon the adequacy of a specified fund. Such an order is conditional."

of our profits on the 3 East 40 street job,"⁵⁵ or "out of the rents,"⁵⁶ or "out of growing substance,"⁵⁷ or "out of the net proceeds of certain ore,"⁵⁸ or "out of a certain claim."⁵⁹ Thus a negotiable instrument must be guaranteed by the whole credit of the parties.⁶⁰ It is to be their note of hand. It must be their promise to pay absolutely and at all events. The instruments we have mentioned would be effectuated, but they would be effectuated as equitable assignments, and not as negotiable instruments. They are in effect mere transfers of single rights, and not instruments fitted to circulate as a medium based upon the entire credit of all the parties.

The mere fact, however, that a particular fund is referred to in an instrument does not make it payable out of the fund.⁶¹ There is a wide difference between instruments drawn payable out of a particular fund and instruments referring to a particular fund from which the drawee may reimburse himself. The former, as has been said, are mere

⁵⁵ *Fulton v. Varney*, 117 App. Div. 572, 102 N. Y. Supp. 608 (N. I. L.).

⁵⁶ 1 *Pars. Bills & N.* 43.

⁵⁷ *Josselyn v. Lacler*, 10 Mod. 294.

⁵⁸ Thus it was held that a written promise to pay a certain amount at a time agreed upon, the means of payment to be derived from ores which were to be dug subsequent to the promise, did not comply with the requisites of a promissory note. There is in such an agreement a want of that certainty of payment necessary in a negotiable instrument. *WORDEN v. DODGE*, 4 Denio (N. Y.) 159, 47 Am. Dec. 247, Moore Cases Bills and Notes, 26.

⁵⁹ *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515; *Ehrichs v. De Mill*, 75 N. Y. 371, and list of authorities collated, 1 *Ames Bills & N.*, note p. 29.

⁶⁰ For example, an instrument otherwise in the form of a note, secured by collateral, which contains a stipulation that the holder will look to the collateral exclusively for payment, is not a note. *Street v. Robertson*, 28 Tex. Civ. App. 222, 66 S. W. 1120; *Allison v. Hollembaek*, 138 Iowa, 479, 114 N. W. 1059 (N. I. L.). Compare *Rathbun v. Jones*, 47 S. C. 208, 25 S. E. 214; *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108 (N. I. L.); *Union Bank of Bridgewater v. Spies*, 151 Iowa, 178, 130 N. W. 928 (N. I. L.). See *Heflin Gold Mining Co. v. Hilton*, 124 Ala. 365, 27 South. 301.

⁶¹ N. I. L. § 3 (subd. 1).

equitable assignments pro tanto of the funds mentioned.⁶² And the drawee, when he has had notice of the delivery of the order to the payee, is bound to apply the fund, as it accrues, to the payment of the order, and to no other purpose. But if an order be made generally upon the drawee to be paid by him in the first instance on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund out of which the drawee is subsequently to reimburse himself for such payment or a particular account to which it is to be charged will not convert the order into an assignment of the fund.⁶³ It must so appear in the order, to have that effect. And the order must contain either an express or implied direction to pay therefrom, and not otherwise. In the absence of express words, it is a question of construction whether the fund in question is referred to as a measure of liability or means of reimbursement.⁶⁴ Where there are no express words, then the fact that the ordinary language of a draft is used implies an intention to make the order negotiable. And this implication overrides the implication that it was in-

⁶² *Lewis v. Berry*, 64 Barb. (N. Y.) 593; *Parker v. City of Syracuse*, 31 N. Y. 376; *Alger v. Scott*, 54 N. Y. 14; *Risley v. Smith*, 64 N. Y. 576; *Ehricha v. De Mill*, 75 N. Y. 370; *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515.

⁶³ *Macleed v. Snee*, 2 Strange, 762; *Re Boyse*, 33 Ch. Div. 612; *Redman v. Adams*, 51 Me. 429; *Shepard v. Abbot*, 179 Mass. 300, 60 N. E. 782, semble; *Waddell v. Hanover Nat. Bank*, 48 Misc. Rep. 578, 97 N. Y. Supp. 305 (N. I. L.); *FIRST NAT. BANK OF HUTCHINSON v. LIGHTNER*, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, 11 Ann. Cas. 596 (N. I. L.), *Moore Cases Bills and Notes*, 27; *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450 (N. I. L.).

⁶⁴ *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737. A premium note, stipulating that in the event of the death of the insured (maker) before maturity, the amount of the note should be deducted from the amount due on the policy, was interpreted to be an agreement that the policy should be pledged as security for the note, and not an agreement to look, in the event of the maker's death before maturity, to the policy exclusively for payment. *Union Bank of Bridgewater v. Spies*, 151 Iowa, 178, 180 N. W. 928 (N. I. L.). See p. 54, note 60, *supra*.

tended as an equitable assignment.⁶⁵ It is the duty of the drawer plainly to limit payment to a particular fund, if he intends so to limit it. If he omits to do this, or if the words used are obscure, ambiguous, or uncertain, the courts assume that the instrument was intended to be a bill of exchange.⁶⁶

Payment on demand

A bill or note payable on demand is payable absolutely, because by the terms of the instrument the time of payment is within the control of the holder.⁶⁷ The purchaser may thus know exactly what to pay when he discounts; such an instrument has a definite value in the market.⁶⁸ An instrument is payable on demand which is expressed to be

⁶⁵ Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737.

⁶⁶ An instrument in the following language: "Mr. I. B. C. & Co.: Please pay C. A. C. \$100.90, and take the same out of our share of the grain,"—is a valid bill of exchange. Corbett v. Clark, 45 Wis. 403, 30 Am. Rep. 763; Johns. Cas. Bills & N. 28. A request to the drawee to pay to a certain person a certain amount of money "as my quarterly half pay, to be due from 24th of June to 27th of September next," was held to constitute a bill of exchange, since "the mention of the half pay was only by way of direction how he should reimburse himself, but the money was still to be advanced on the credit of the person." Macleed v. Snee, 2 Strange, 762; Sproat v. Matthews, 1 Term R. 182; Redman v. Adams, 51 Me. 429; Spurgin v. McPheeeters, 42 Ind. 527.

⁶⁷ N. I. L. § 1 (subd. 3).

⁶⁸ For the same reasons bills and notes payable at a fixed period after demand or after sight are valid as such. N. I. L. § 4 (subd. 1); Walker v. Roberts, Carrington & M. 590; Beckstrom v. Krone, 125 Ill. App. 376. See Holmes v. Kerrison, 2 Taunt. 323; Thorpe v. Coombe, 8 Dowling & R. 347. Similarly, a bill or note may be made payable on demand after a fixed or determinable future day. Heywood v. Perrin, 27 Mass. (10 Pick.) 228, 20 Am. Dec. 518; Franklin Sav. Inst. v. Reed, 125 Mass. 365; Capron v. Capron, 44 Vt. 410; Towle v. Starz, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463 (dissenting opinion); 2 Parsons, Bills & N. p. 540. It has been suggested that a bill or note may be made payable on a fixed date *or* thereafter on demand at the election of the holder. First Nat. Bank of Pomeroy, Iowa, v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 520 (N. I. L.). There seems to be no objection to such an instrument. The note with respect to which the suggestion was made, was not, however, such an one. See p. 71, note 7.

payable on demand, or at sight, or on presentation,⁶⁹ or in which no time for payment is expressed.⁷⁰ Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.⁷¹

Payment in Installments

It remains to notice instruments payable in installments. An instrument may be payable in installments due at specified times;⁷² or it may be payable in installments due at

⁶⁹ N. I. L. § 7 (subd. 1). Equivalent expressions are: "When demanded," "on call," "at any time called for." *Bowman v. McChesney*, 22 Grat. (Va.) 609, semble. A certificate of deposit payable "upon return of this certificate properly indorsed" is payable upon demand. *HATCH v. FIRST NAT. BANK*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401, *Moore Cases Bills and Notes*, 49; *Dickey v. Adler*, 143 Mo. App. 326, 127 S. W. 583 (N. I. L.). Whether such a certificate requires a presentation to mature it is another question. See N. I. L. § 70; *Daniel, Neg. Inst.* (5th Ed.) §§ 1707, 1707a. Notes in which the time of payment is expressed by the phrase "on demand after date" have been interpreted to be payable on demand. *Hitchings v. Edmunds*, 132 Mass. 338; *Fenno v. Gay*, 146 Mass. 118, 15 N. E. 87; *O'Neill v. Magner*, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88, semble; *Rigley v. Watts*, 15 Ohio Cir. Ct. R. 645; *Fifth Nat. Bank of Cincinnati v. Woolsey*, 31 App. Div. 61, 52 N. Y. Supp. 827, 829, semble; *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.), semble; *Van Vliet v. Kanter*, 65 Misc. Rep. 48, 119 N. Y. Supp. 187 (N. I. L.); *Peirpont v. Peirpont*, 71 W. Va. 431, 76 S. E. 848, 850, 43 L. R. A. (N. S.) 783, semble. But *Crim v. Starkweather*, 88 N. Y. 339, 42 Am. Rep. 250, semble; *Hardon v. Dixon*, 77 App. Div. 241, 78 N. Y. Supp. 1061; *Foley v. Emerald & Phoenix Brewing Co.*, 61 N. J. Law, 428, 39 Atl. 650, semble, are contra.

⁷⁰ N. I. L. § 7 (subd. 2); *McLeod v. Hunter*, 29 Misc. Rep. 558, 61 N. Y. Supp. 73 (N. I. L.); *Didato v. Coniglio*, 50 Misc. Rep. 280, 100 N. Y. Supp. 466 (N. I. L.); *Gilbert v. Adams*, 146 App. Div. 864, 431 N. Y. Supp. 787 (N. I. L.). Notes in which the blank for the time of payment has not been filled in, e. g., "..... after date," have been held to be payable on demand. *W. H. Dodd & Co. v. Denny*, 6 Or. 156; *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125; *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Furstenfeld v. Furstenfeld*, 152 Mo. App. 726, 131 S. W. 359. But see *Usefot v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290 (N. I. L.).

⁷¹ N. I. L. § 7 (last sentence); *Bassenhorst v. Wilby*, 45 Ohio St. 333, 18 N. E. 75; *Smith v. Caro*, 9 Or. 278.

⁷² N. I. L. § 2 (subd. 2). The amount of each of the several installments may be within the maker's control, if the whole sum payable

specified times, the whole sum to become due on the default in the payment of an installment of principal or interest. And either clause, the latter, however, with what seems a lack of appreciation of sound business methods, the courts declare to be proper for a negotiable instrument.⁷⁸ From a business point of view, a man may as well give one piece of paper payable in several installments as divide up the principal indebtedness and give separate instruments for it. But there is a great difference between such an instrument and one which may become wholly due, at the payee's option, by reason of a default at any one of a series of times. Instruments of the last class are open to the criticism that they are uncertain in amount, as well as in time of payment of installments subsequent to the first; but in spite of these considerations their negotiability is firmly established.

is certain. *Riker v. A. & W. Sprague Mfg. Co.*, 14 R. I. 402, 51 Am. Rep. 413. The amount and time of payment of each installment may be within the holder's control if the whole sum payable is certain. *President, etc., of Goshen & Minisink Turnpike Road Co. v. Hurtin*, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273, *semble*; *WHITE v. SMITH*, 77 Ill. 351, 20 Am. Rep. 251, *Moore Cases Bills and Notes*, 32; *Stillwell v. Craig*, 58 Mo. 24. See *Washington County Mut. Ins. Co. v. Miller*, 26 Vt. 77.

⁷⁸ N. I. L. § 2 (subd. 3); *Carlton v. Kenealy*, 12 M. & W. 139; *Phelps v. Sargent*, 69 Minn. 118, 71 N. W. 927; *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337; *THORP v. MINDEMAN*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003 (N. I. L.), *Moore Cases Bills and Notes*, 36; *Newbern Banking & Trust Co. v. Duffy*, 153 N. C. 62, 68 S. E. 915 (N. I. L.); *Mackintosh v. Gibbs* (N. J.) 80 Atl. 554 (N. I. L.). Similarly, the several notes of a series may provide that all shall mature upon default in the payment of one, without destroying their negotiability. *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524 (N. I. L.). And the validity of the note as such is not affected by a clause maturing it upon the default of the maker in the performance of the covenants of a collateral mortgage to pay taxes, to keep insured, not to commit waste, etc. *THORP v. MINDEMAN*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003 (N. I. L.), *Moore Cases Bills and Notes*, 36; *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697; *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160, *semble*. Contra: *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779, *semble*. See *Brooke v.*

Instruments payable at a Fixed Date or Earlier at the Unconditioned Election of the Holder

Notwithstanding the unquestioned status of bills and notes payable on demand and the recognition of the validity of notes payable at a fixed day with a stipulation authorizing the holder to accelerate maturity upon the maker's default, instruments payable at a fixed date or earlier at the unconditioned election of the holder have been held not to be bills or notes. Thus an instrument otherwise in the form of a note, payable at a fixed date, but containing a warrant of attorney authorizing the holder at his pleasure to confess judgment before the day fixed for maturity, has been held not negotiable.⁷⁴ Similarly, an instrument authorizing the holder, whenever he deems himself insecure, to declare it due forthwith before the day fixed for payment, has been held not a promissory note.⁷⁵ Notes authorizing the holder to accelerate maturity upon the happening of the maker's default have been distinguished from such instruments by pointing out that in the former "the contingency depends upon some act done or omitted to be done by the

Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Consterdine v. Moore, 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620; Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598.

⁷⁴ Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191, 48 N. W. 1086; WISCONSIN YEARLY MEETING OF FREEWILL BAPTISTS v. BABLER, 115 Wis. 289, 91 N. W. 678 (N. I. L.), Moore Cases Bills and Notes, 34; Milton Nat. Bank v. Beaver, 25 Pa. Super. Ct. 494 (N. I. L.); First Nat. Bank of Elgin, Ill., v. Russell, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203 (N. I. L.).

⁷⁵ Smith v. Marland, 59 Iowa, 645, 13 N. W. 852; Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; Lincoln Nat. Bank v. Perry, 86 Fed. 887, 14 C. C. A. 273; Commercial Nat. Bank of Chicago v. Consumers' Brewing Co., 16 App. D. C. 186; Same v. Same, 17 App. D. C. 100; Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126 (N. I. L.); Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237 (N. I. L.); Holiday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1 (N. I. L.); Hibernia Bank v. Dresser, 132 La. 532, 61 South. 561 (N. I. L.); Continental Bank v. Baker, 132 La. 544, 61 South. 575 (N. I. L.). See South Bend Iron-Works v. Paddock, 37 Kan. 510, 15 Pac. 574.

maker or upon the occurrence of some event indicated in the note, and not upon any act of the payee or holder";⁷⁶ and it has been said that a stipulation for the acceleration of maturity at the whim or caprice of the holder, or whenever he deems himself insecure, is "so completely subject to the contingencies of every passing hour from and after the very moment of execution and delivery that * * * it constitutes an innovation in the conditions of negotiable paper that ought not to be sanctioned."⁷⁷ Recently it has been suggested that the reason for the invalidity of such instruments is that they are not payable on demand *or* at a fixed date, but are in effect payable both on demand *and* at a fixed date.⁷⁸ It is submitted that there is no reason supporting the validity of notes the maturity of which may be accelerated at the holder's election upon the maker's default, not applying with equal force in the case of the class of instruments under discussion.⁷⁹

⁷⁶ Ernst v. Steckman, 74 Pa. 13, 17, 15 Am. Rep. 542.

⁷⁷ Commercial Nat. Bank of Chicago v. Consumers' Brewing Co., 16 App. D. C. 186, 204; Same v. Same, 17 App. D. C. 100, 101.

⁷⁸ Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126 (N. I. L.). It has also been suggested that such instruments are uncertain as to the amount payable at maturity. In State Bank of Halstad v. Bilstad (Iowa) 136 N. W. 204, 207 (N. I. L.), the court, referring to Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237 (N. I. L.), says: "So far as the latter case holds the notes therein considered non-negotiable because of uncertainty as to time of payment, it should be modified. * * * The case was rightly decided on the authority of Smith v. Marland, 59 Iowa, 645, 13 N. W. 832, where the note contained a similar provision, and we held that it was non-negotiable on account of uncertainty as to the amount." In most jurisdictions, however, uncertainty of amount would not be available as a ground of decision. President, etc., of Goshen & Minisink Turnpike Road v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273, *semble*; WHITE v. SMITH, 77 Ill. 351, 20 Am. Rep. 251; Moore Cases Bills and Notes, 32; Stillwell v. Craig, 58 Mo. 24; Cooke v. Horn, 29 L. T. N. S. 369; Riker v. A. & W. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413; Louisville Banking Co. v. Gray, 123 Ala. 251, 26 South. 205, 82 Am. St. Rep. 120. See Commercial Nat. Bank of Chicago v. Consumers' Brewing Co., 16 App. D. C. 186, 199, 202, 203; 9 H. L. R. 219. But see Roblee v. Union Stockyards Nat. Bank, 69 Neb. 180, 95 N. W. 61.

⁷⁹ Louisville Banking Co. v. Gray, 123 Ala. 251, 26 South. 205, 82

PAYMENT OF MONEY ONLY

21. The instrument must be for payment in money only.
22. A negotiable instrument must be for the payment of money without connected promise, whether disjunctive or conjunctive, for the performance of some other act.
23. (a) A negotiable instrument may contain an additional agreement, which is not of the essence of the order or promise, but is merely incidental or collateral to it.
24. (b) A negotiable instrument may give the holder an option between payment of money and some other thing.
25. The amount of money to be paid must be certain.

EXCEPTIONS—(a) That the instrument is payable with interest does not destroy its negotiability.
(b) That the instrument is payable with current exchange does not destroy its negotiability.

Definition of "Money"

Bills and notes, being representatives of money, must be payable in money.⁸⁰ "Money," within this rule, means whatever may be used as legal tender for payment of debts at the place where the bill or note is payable.⁸¹ In the

Am. St. Rep. 120; Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356. See Citizens' Bank of Los Angeles v. Jones, 121 Cal. 30, 53 Pac. 354.

⁸⁰ N. I. L. § 1 (subd. 2). See N. I. L. § 132.

⁸¹ But some cases have extended this definition so as to include a medium of payment which was in fact treated at the place of payment as equivalent to legal tender, e. g., state bank notes. Keith v. Jones, 9 Johns. (N. Y.) 120; Judah v. Harris, 19 Johns. (N. Y.) 144; Swetland v. Creigh, 15 Ohio, 118. But Rex v. Wilcox, Bailey, Bills (6th Ed.) 11, decided before Bank of England notes were made legal tender, is contra. See 1 Ames Cas. Bills & N. 38, note 2. On the other hand, in Gray v. Worden, 29 U. C. Q. B. 539, it was held that an instrument payable in "Canada bills" was not a note, notwithstanding a statute making such bills legal tender. The court said: "It may be that a person can make a promissory note payable in a

United States what is legal tender is determined by the "Legal Tender Acts."⁸² Where there are several kinds of legal tender, as gold, silver, and notes, a bill or note may be made payable in either.⁸³ But all other kinds of currency, whether coin or paper, are in law but "collateral commodities, like ingots or diamonds, which, though they might be received, and be in fact equivalent to money, are yet but goods and chattels,"⁸⁴ or mere choses in action. For this

particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in Canada bills, because they are not money or specie. They have no intrinsic value, as coin has; they represent only, and are the signs of, value. 'Money itself is a commodity; it is not a sign; it is the thing signified.' McCulloch, *Polit. Econ.* 135." But this opinion, as Prof. Ames points out (2 Cas. Bills & N. 829), "however sound in political economy, is unsound in law."

⁸² Rev. St. U. S. §§ 3584–3590 (U. S. Comp. St. 1901, pp. 2400–2402). As to national bank notes, see Act June 3, 1864, c. 106, 13 Stat. 106.

⁸³ N. I. L. § 6 (subd. 5); *Chrysler v. Renois*, 43 N. Y. 209.

⁸⁴ THOMPSON v. SLOAN, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546, Moore Cases Bills and Notes, 44, per Cowen, J. It will be noted that this definition of money deprives bills and notes in which the designated medium of payment, as distinguished from the sum to be paid (as to the effect of expressing the sum to be paid in foreign money, see p. 67, *infra*), is the money of a country other than that in which the instrument is payable, of their status as such. That such instruments are not bills or notes was the opinion of the court in THOMPSON v. SLOAN, *supra*, and one of the grounds of its decision in that case, where the instrument was for a sum of United States dollars payable in New York in Canada money. Professor Ames was of the same opinion (2 Ames Cas. Bills & N. 828), and he has been followed by Mr. Justice Russell (Russell, Bills, pp. 55–58). Story (Bills, § 43; Notes, § 17), Chitty (Bills [9th Ed.] *p. 134), Daniel (Negotiable Instruments, § 58) and Tiedeman (Commercial Paper, § 29b), are sometimes cited for the contrary view. It is far from clear whether Story, Chitty, and Tiedeman are not speaking of the use of the denominations of money, or names of coins, of a foreign money in the designation of the sum to be paid, rather than of the medium of payment. Indeed, it seems probable that they are simply stating the unquestioned rule that a bill or note may express the sum to be paid in the terms of the money of any country. See Story on Bills, §§ 44, 45; Story on Notes, § 17, last sentence. See, also, comments in Russell on Bills, p. 55. Since such an instrument according to English and American law is payable in money of the country where it is payable (THOMPSON v. SLOAN, *supra*; Chitty on Bills [9th Ed.]

reason an instrument which possesses all the other requisites of a bill or note is not such if the medium of payment be "foreign bills," or "checks," or "exchange."⁸⁵ Whether an instrument, the medium of payment of which is "current funds," or "currency," is a bill or note is a question of construction in the solution of which the courts have not been unanimous. Some hold that "current funds" or "currency" means nothing more than legal tender;⁸⁶ while others give those expressions a meaning wide enough to include not

*⁸⁵25; English Bills of Exchange Act, § 72), the question under discussion does not arise. In addition to THOMPSON v. SLOAN, supra, St. Stephen Branch Ry. v. Black, 2 Hannay, 139, and Bettis v. Weller, 30 U. C. Q. B. 23, are the only cases in England or in North America in point. In the former a conclusion contrary to the decision in THOMPSON v. SLOAN was reached, and the Supreme Court of New Brunswick held that an instrument payable in New Brunswick in the medium of United States money was a note. The latter case is in accordance with THOMPSON v. SLOAN. The authority of Bettis v. Weller, however, is weakened by the fact that in Third National Bank v. Crosby, 43 U. C. Q. B. 58, 69, it is in terms overruled, although the court was dealing with dissimilar facts. Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, and HOGUE v. WILLIAMSON, 85 Tex. 553, 22 S. W. 580, 20 L. R. A. 481, 34 Am. St. Rep. 823, Moore Cases Bills and Notes, 47, are often cited, but neither is in point. In both of those cases the medium of payment designated was the money of the country where the instrument was payable. Whatever, the Anglo-American law may be, in Scotland (before 1882) and on the continent, since a bill, in which the sum payable is expressed in a money other than that of the place of payment, either may or must be paid in the foreign money designated, it would seem that a bill or note of which the designated medium of payment is not the legal tender of the place of payment would be valid.⁸⁷ Thompson on Bills, p. 254; German Exchange Act, art. 37; Staub, Wechselordnung (1899) pp. 103, 19; Commercial Code of France, art. 143; Commercial Code of Spain, art. 494. Compare, however, English Bills of Exchange Act, § 72.

⁸⁶Jones v. Fales, 4 Mass. 245; The Lykus (D. C.) 36 Fed. 919; First Nat. Bank of Farmersville v. Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334; First Nat. Bank of Brooklyn v. Slette, 87 Minn. 425, 69 N. W. 1148, 64 Am. St. Rep. 429; Chandler v. Calvert, 87 Mo. App. 368. See Phoenix Ins. Co. v. Gray, 13 Mich. 191.

⁸⁷Telford v. Patton, 144 Ill. 611, 33 N. E. 1119; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Butler v. Paine, 8 Minn. 324 (Grl. 284); Phelps v. Town, 14 Mich. 374; Laird v. State, 61 Md. 309; McCormick v. Kampmann (Tex.) 109 S.

only legal tender, but other possible media of payment.⁸⁷ Though accepting the same criterion—i. e., that the medium of payment of a bill or note must be money—they have arrived at various conclusions as to the meaning of the terms in question. In a recent case,⁸⁸ in determining that an instrument in the form of a certificate of deposit, payable in "current funds," was a promissory note, the court reviewed the authorities and stated its conclusions as follows:

"The first objection is that it is not made payable in 'money,' that 'current funds,' in which it is made payable, should not be judicially interpreted to mean 'money.' We do not think this contention should prevail. This subject has been discussed exhaustively by many courts, and the conclusions they have reached on the one side and the other are not in harmony. But we think that the modern and better doctrine is that the term 'current funds,' when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money, funds which are current by law as money, and that, when thus construed, a certificate of deposit payable in current funds is in this respect negotiable. It is well known that certificates of deposit are commonly made payable in 'currency,' or in 'current funds,' and we believe that the interpretation we have given is in accord with the universal understanding of parties giving and receiving these instruments, an understanding which we should resort to as an aid to interpretation, unless the words themselves fairly import some other meaning. Some courts hold that evidence may be received to show the meaning of the terms 'currency,' 'current funds.' But, in the absence of evidence, these courts come to opposite conclusions. For instance, in Iowa,

W. 492; *s. c.*, 24 Tex. Civ. App. 462, 59 S. W. 832; *Forrest v. Safety Banking & Trust Co.* (C. C.) 174 Fed. 345 (N. I. L.); *Pomeroy Nat. Bank v. Huntington Nat. Bank* (W. Va.) 79 S. E. 662.

⁸⁷ *Platt v. Sauk County Bank*, 17 Wis. 222; *Wright v. Hart's Adm'r*, 44 Pa. 454; *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244; *Mobile Bank v. Brown*, 42 Ala. 108; *Dille v. White*, 132 Iowa, 327, 109 N. W. 109 (N. I. L.).

⁸⁸ *HATCH v. FIRST NAT. BANK*, 94 Me. 348, 351-353, 47 Atl. 908, 80 Am. St. Rep. 401, Moore Cases Bills and Notes, 49.

the court holds that notes payable in currency are *prima facie* non-negotiable, but that evidence may be received to prove that the word 'currency' describes that which by custom or law is money, and thus the instruments may be shown to be commercial paper. *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244. On the other hand, in Michigan, it was held that, where a certificate of deposit was made payable in currency, '*prima facie*, at least, that must be held to mean money current by law, or paper equivalent in value circulating in the business community at par.' 'Such, we think,' said the court, 'is the general signification, the fair import, and the ordinary legal effect of the term.' *Phelps v. Town*, 14 Mich. 374; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756.

"Still other authorities hold that the terms 'currency' or 'current funds,' used in commercial paper, *ex vi termini* mean money. Judge Campbell, in *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 162, after a critical examination of a mass of authorities, declared that, with few exceptions, 'the general course of authority is in favor of the negotiability of paper payable in currency, or in current funds. And these decisions rest upon the ground that those terms mean money, as the necessity of having negotiable paper payable in money is fully recognized.'

"The term "funds," say the court in *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, 81 Am. Dec. 284, 'as employed in commercial transactions, usually signifies money. Then the term "current funds" means current money, par funds, or money circulating without any discount.' Respecting an instrument payable in 'current funds,' the Maryland court said: 'The words "current funds" as used in the paper before us mean nothing more or less than current money, and so construed the instrument was negotiable.' *Laird v. State*, 61 Md. 311. See also *Miller v. Race*, 1 Burr. 452; 1 Smith's Leading Cases, 808. The Supreme Court of the United States had occasion, in *Bull v. Bank of Kasson*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97, to pass upon the negotiability of an instrument which had been made payable in 'current funds.' That court said: 'Undoubtedly it is the

law that, to be negotiable, a bill, promissory note, or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of these words."

Payment in Property Other than Money

The real reason for the requirement that negotiable instruments must be payable in money obviously is that money is the one standard of value in actual business. All other commodities may rise and fall in value, but in theory, at least, money always measures this rise and fall, and remains the same. The chattel which is used as a means of payment may fluctuate in value. Thus, a note for sixty dollars "to be paid in neat cattle,"⁸⁸ and a promise to pay "in a good horse, to be worth \$80.00, and goods out of store amounting to \$20.00,"⁸⁹ are non-negotiable. These instruments are special contracts for delivery of chattels, and not negotiable instruments.⁹⁰ The damages recoverable upon

⁸⁸ Jerome v. Whitney, 7 Johns. (N. Y.) 322.

⁸⁹ Thomas v. Roosa, 7 Johns. (N. Y.) 461. For other authorities, see Byles, Bills (Wood's Notes) p. 95.

⁹⁰ Matthews v. Houghton, 11 Me. 377; Rhodes v. Lindley, Ohio Cond. R. 485; Lawrence v. Dougherty, 5 Yerg. (Tenn.) 435; Auerbach v. Pritchett, 58 Ala. 451; Smith v. Boheme, 1 Chit. Jr. Bills, 234; Clark v. King, 2 Mass. 524; Gushee v. Eddy, 11 Gray (Mass.) 502, 71

them are held to be in some states the actual value of the articles on the day stipulated for payment;⁸² but in New York,⁸³ although it is admitted that these contracts are merely for the delivery of specific articles, yet when the words were, "To pay J. P. \$79.50, Aug. 1st, 1822, in salt, at 14s. per bbl." it was held that it was intended at the time of making the contract to receive the goods instead of money, and that the goods had, therefore, a fixed value, which must be treated as the measure of damages. In other respects, the debtor must seek his creditor to perform the contract as is the usual rule. If the chattels are ponderous, the maker of the note must seek the payee, and see where he will receive them.

Sum Payable Expressed in Terms of Foreign Money

There is one apparent deviation from the rule requiring the medium of payment to be money. The expression in a bill or note of the sum payable in the denominations of foreign money does not affect its validity as such. In the absence of a specific designation of a medium of payment, the instrument is construed as calling for the payment of money of the country in which it is payable; the sum of foreign money stated is taken to be an indirect way of expressing the amount of money (of the place of payment) to be paid.⁸⁴

The courts, under the statutes of the United States,⁸⁵ will take judicial notice of the fact that the value of foreign

Am. Dec. 728. In *Quinby v. Merritt* it was held that a written agreement to pay the equivalent of a certain sum in labor did not constitute a promissory note. 11 *Humph.* (Tenn.) 439.

⁸² *McDonald v. Hodge*, 5 *Hayw.* (Tenn.) 85; *Edgar v. Boies*, 11 *Serg. & R.* (Pa.) 445.

⁸³ *Pinney v. Gleason*, 5 *Wend.* (N. Y.) 393, 21 Am. Dec. 223. Vermont, Connecticut, and Ohio have a similar rule. *Culver v. Robinson*, 3 *Day* (Conn.) 68; *Perry v. Smith*, 22 *Vt.* 301.

⁸⁴ "A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and it is so understood judicially." *THOMPSON v. SLOAN*, 23 *Wend.* (N. Y.) 71, 35 Am. Dec. 548, *Moore Cases Bills and Notes*, 44, per Cowen, J. Compare *Moore's Ex'r's v. Russell*, 5 *Ky.* (2 *Bibb*) 442.

⁸⁵ Rev. St. § 3564, 28 Stat. L. 552 (U. S. Comp. St. 1901, p. 2375).

coin, as expressed in the money of account in the United States, shall be that of the pure metal of such coin of standard value; and that the value of the standard coin of the various nations of the world in circulation is estimated periodically by the director of the mint, and proclaimed by the Secretary of the Treasury. These foreign denominations therefore can always be paid in our own coin of equivalent value, to which it is always reduced on a recovery.⁹⁶ In an action upon such an instrument the course is to prove the value of the sum expressed in our own tenderable coin, because the instrument can be construed by the courts to be payable in no other.⁹⁷ In the calculation of this sum there is to be added the item called "exchange." This means the difference in value of the same amount of money in different countries. Thus, in the illustration in the footnote,⁹⁸ if there were more debts due from England to Jamaica than from Jamaica to England, the demand in England for bills on Jamaica would be greater than the demand in Jamaica for bills on England. Hence, in England, it would be more expensive to procure a bill on Jamaica than it would be, in Jamaica, to procure a bill on England. Thus B., in England, would be obliged to pay A. something for the debt C., in Jamaica, owes to A., in England, because the other English debtors would willingly pay something to avoid the risk and expense of transmitting money to discharge their debts. And thus B. must pay A. something in addition for the draft which A. sells him, and which A. could otherwise sell in the open market.

⁹⁶ 2 Chit. Bills (Am. Ed. 1839) 615, 616; Deberry v. Darnell, 5 Yerg. (Tenn.) 451.

⁹⁷ THOMPSON v. SLOAN, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546, Moore Cases Bills and Notes, 44; Bayley, Bills (Am. Ed. 1836) 23.

⁹⁸ If A. and B. are in England, and C. in Jamaica be indebted to A. £1,000, and B. be going to Jamaica, he may pay A. this £1,000 and take a bill of exchange drawn by A. in England upon C. in Jamaica. B., on his way to Jamaica, may be paid the £1,000 for the bill by D. in New York, and indorse it to him; D. may be paid for the bill £1,000 by E. in Charleston, and indorse it to him; and E. will collect the money of C., to whom it is presented for acceptance, in Jamaica, and who accepts it.

This something is the amount which it will cost to replace the £1,000 in England in Jamaica, or which the right to a sum of money due in Jamaica will produce in money in England. The rate of exchange depends upon the balance of trade with England; and if it is excessive, and is sufficient to pay the expense of exporting the precious metals, gold will be sent in preference to bills of exchange purchased at the current rate.⁹⁹ This item, as has been said, is to be added, and the courts construe the instrument to mean, where it is drawn in one country and payable in another, and the amount is expressed in the money of the former, that the amount must be calculated according to the rate of exchange on the day the instrument is payable.¹⁰⁰

Performance of Other Acts in Addition to Payment of Money. The reasons already given have led to the rule that the order or promise must not be for the payment of money and the performance of some other act.¹ The authority generally quoted on this point is *Martin v. Chauntry*.² This instrument was a note "to deliver up horses and a wharf, and pay money." It was held not to be a note within the statute of Anne; for, said Baron Parke in a later case,³ to constitute a promissory note the promise must be to pay a sum certain and nothing else.⁴ The reason for this is that to ingraft a special agreement upon a general promise to pay money would be at once to defeat its practical usefulness as a quasi money. Professor Ames, with his usual force, points out the objections: "One could be indorsed, the oth-

⁹⁹ *Schermerhorn v. Talman*, 14 N. Y. 93, 136.

¹⁰⁰ *Grant v. Healey*, 3 Sunn. 523, Fed. Cas. No. 5,696; *Smith v. Shaw*, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48; *Bank of Missouri v. Wright*, 10 Mo. 719; *Scott v. Bevan*, 2 Barn. & Adol. 78; *Cash v. Kennion*, 11 Ves. 314.

¹ N. I. L. § 5.

² *2 Strange*, 1271.

³ *Follett v. Moore*, 4 Exch. 416.

⁴ *Cook v. Satterlee*, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432; *Fletcher v. Thompson*, 55 N. H. 308; *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 433, 27 N. W. 589; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1 (N. I. L.); *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110 (N. I. L.). See *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61.

er would have to be assigned. In some jurisdictions the action could be brought by the indorsee in his own name, but as assignee he could only sue in the name of his assignor. In the case of the negotiable instrument being in the hands of a bona fide holder, no defense of fraud or latent equity would avail; in case of the holder as assignee, all would avail."

Terms Collateral or Incidental to Order or Promise

But while an instrument which incorporates with the order or promise to pay an agreement to do some other act is not a bill or note, it is possible, without destroying the negotiability of a bill or note, to annex to it an agreement which relates to it, but which is merely incidental.⁵ Thus

⁵ The incorporation of a promise to pay the deficiency arising upon the sale of property pledged or mortgaged to secure the instrument does not deprive it of its status as a bill or note. *Arnold v. Rock R. V. U. R. Co.*, 5 Duer (N. Y.) 207; *Towne v. Rice*, 122 Mass. 67; *VALLEY NAT. BANK OF CHAMBERSBURG v. CROWELL*, 148 Pa. 284, 23 Atl. 1068, 33 Am. St. Rep. 824, *Moore Cases Bills and Notes*, 54. Similarly, the incorporation in a note of a promise looking to the preservation of the security is, it seems, unobjectionable; e. g.: A promise to keep mortgaged property insured, *Farmer v. First Nat. Bank of Malvern*, 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79; or free of incumbrances, *National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479; *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828, contra (see page 112, *infra*); or to pay the taxes upon it. *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872; *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 180; *Bradbury v. Kinney*, 63 Neb. 754, 89 N. W. 257; *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697; *THORP v. MINDEMAN*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003 (N. I. L.), *Moore Cases Bills and Notes*, 36; *Barker v. Sartori*, 68 Wash. 260, 119 Pac. 611 (N. I. L.). But a promise to deliver additional collateral deprives the instrument of a status as a bill or note. *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, *Ann. Cas.* 1912D, 1; *Hibernia Bank v. Dresser*, 132 La. 532, 61 South. 561 (N. I. L.); *Continental Bank v. Baker*, 132 La. 544, 61 South. 575 (N. I. L.). See *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61; *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110 (N. I. L.). A fortiori, the recital in a note of the act or promise of the payee which was the consideration for it (see p. 46, note 41, *supra*), or of the fact that property has been pledged or mortgaged to secure it (*Wise v. Charlton*, 4 Adol. & E. 786; *Daniel, Neg. Inst.* [5th Ed.] § 51), or of the fact that the consideration was a chattel sold to the

an instrument is none the less negotiable because it contains provisions, to take effect if it is not paid at maturity, (1) authorizing the holder to confess judgment for the maker;⁶ or (2) waiving defenses, or the benefit of stay or exemption laws;⁷ or (3) promising to pay costs of collec-

maker, the title to which is to remain in the payee until payment (see p. 48, note 41, *supra*), or of the existence of a collateral contract in writing (see pages 114, 115, *infra*), is unobjectionable.

⁶ N. I. L. § 5 (subd. 2); OSBORN v. HAWLEY, 19 Ohio, 130, Moore Cases Bills and Notes, 55. Overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645, *contra*. But an authority to the holder at his pleasure to confess judgment before maturity invalidates a promissory note as such. Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191, 48 N. W. 1086; WISCONSIN YEARLY MEETING OF FREEWILL BAPTISTS v. BABLER, 115 Wis. 289, 91 N. W. 678 (N. I. L.), Moore Cases Bills and Notes, 34; Milton Nat. Bank v. Beaver, 25 Pa. Super. Ct. 494 (N. I. L.); First Nat. Bank of Elgin, Ill., v. Russell, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203 (N. I. L.).

⁷ N. I. L. § 5 (subd. 3); Zimmerman v. Anderson, 67 Pa. 421, 5 Am. Rep. 447 (distinguishing Overton v. Tyler, *supra*); FIRST NAT. BANK OF MONTGOMERY v. SLAUGHTER, 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88, Moore Cases Bills and Notes, 56; Myers v. Petty, 153 N. C. 462, 69 S. E. 417 (N. I. L.); Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787; *Ex parte Bledsoe* (Ala.) 61 South. 813 (N. I. L.). Similarly, the status of an instrument as a note is not affected by a clause consenting to the sale of property pledged to secure it in some manner other than that provided by law. N. I. L. § 5 (subd. 1); VALLEY NAT. BANK OF CHAMBERSBURG v. CROWELL, 148 Pa. 284, 23 Atl. 1068, 33 Am. St. Rep. 824, Moore Cases Bills and Notes, 54. For the same reason the incorporation in a note of a consent on the part of the accommodation makers and of the indorsers that the holder may give time to the maker or other party who is in fact the principal debtor without prejudicing the holder's rights does not deprive the instrument of its status as a note. Yates v. Evans, 61 L. J. Q. B. 446 (B. E. A.); Kirkwood v. Carroll, [1903] 1 K. B. 531 (C. A.) (B. E. A.), overruling Kirkwood v. Smith, [1896] 1 Q. B. 582 (B. E. A.), *contra*; Jacobs v. Gibson, 77 Mo. App. 244; City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123; National Bank of Commerce v. Kennedy, 98 Tex. 293, 83 S. W. 368; Farmer, Thompson & Heisell v. Bank of Graettinger, 130 Iowa, 469, 107 N. W. 170; State Bank of Halstad v. Bilstad (Iowa) 136 N. W. 204 (N. I. L.), *semble*; First Nat. Bank of Pomeroy, Iowa, v. Butterly, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 520 (N. I. L.); Missouri-Lincoln Trust Co. v. Long, 31 Okl. 1, 120 Pac. 291; De Groat v. Focht, 37 Okl. 267, 181 Pac. 172 (N. I. L.); Longmont Nat. Bank v. Loukonen, 53 Colo.

tion and attorney's fees.⁸ It was said by Gibson, C. J., in a case which held that a power to confess judgment, and waiver of stay of execution and appraisement, rendered a

489, 127 Pac. 947 (N. I. L.); *Stitzel v. Miller*, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412 (N. I. L.); *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787 (N. I. L.). In several jurisdictions, however, instruments containing such a consent, unless it is restricted to extensions at or after maturity, have been held not to be notes. *Coffin v. Spencer* (U. S. C. C., Ind.) 39 Fed. 262; *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90; *Second Nat. Bank of Richmond v. Wheeler*, 75 Mich. 546, 42 N. W. 963; *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; *Brown v. First Nat. Bank of Indianapolis*, 115 Ind. 572, 18 N. E. 56, *semble*; *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004; *Merchants' & Mechanics' Sav. Bank v. Fraze*, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341; *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224; *Matchett v. Anderson Foundry & Machine Works*, 29 Ind. App. 207, 64 N. E. 229, 94 Am. St. Rep. 272; *Evans v. Odem*, 30 Ind. App. 207, 65 N. E. 755; *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; *City Nat. Bank v. Gunter Bros.*, 67 Kan. 227, 72 Pac. 842; *Sykes v. Citizens' Nat. Bank of Des Moines*, 69 Kan. 134, 76 Pac. 393; *s. c.*, 78 Kan. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 685; *Rossville State Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, 33 L. R. A. (N. S.) 738 (N. I. L.); *Union Stock Yards Nat. Bank of South Omaha v. Bolan*, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146 (N. I. L.). This result has been reached by interpreting the consent either as giving the holder the right at his whim to postpone from time to time the day of maturity, or as making the day of maturity depend upon the agreement in force for the time being between the holder and the principal debtor. But the clause in question in terms does nothing more than consent to a collateral contract giving time to the maker upon the note. *Wellington Nat. Bank v. Thomson*, 9 Kan. App. 667, 59 Pac. 178. Such a contract, even if made before maturity, in no way postpones the day of maturity specified in the note, but, at most, notwithstanding the arrival of the day of maturity, inhibits, for the time agreed upon, the bringing of an action against the maker by the holder who gave the extension, or by a purchaser with notice of it. See *Lyndon Sav. Bank v. International Co.*, 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900; *Mendenhall Lumber Co. v. State Bank of McHenry*, 97 Miss. 648, 54 South. 883; *Williams v. Liphart* (Va.) 81 S. E. 77 (N. I. L.). See, also, p. 109 et seq., *infra*.

⁸ N. I. L. § 2 (subd. 5); *First Nat. Bank of Shawano v. Miller*, 139 Wis. 126, 120 N. W. 820, 131 Am. St. Rep. 1040 (N. I. L.); *McCormick v. Swem*, 36 Utah, 6, 102 Pac. 626 (N. I. L.); *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.)

note non-negotiable, that "a negotiable bill or note is a courier without luggage," and that "the parties could not have intended to impress a commercial character on the note, dragging after it, as it would, a train of special provisions, which would materially impede its circulation."⁹

But in answer to this objection it has been well said that such provisions do not impede, but aid, the circulation. While in answer to another objection, which has been urged, that a provision for payment of costs and attorney's fees renders uncertain the amount to be paid, it is a sufficient answer that, the amount payable at maturity being certain, a promise to pay an additional, even if uncertain, amount in case of non-payment at maturity, after which time the instrument necessarily ceases to be negotiable, does not impair its negotiability.

Payment in Alternative

In HODGES v. SHULER¹⁰ the instrument was a promise to pay to S. or order \$1,000, with interest, to which was appended, "or, upon the surrender of this note, together with the interest warrants, not due to the treasurer [of the

787 (N. I. L.); Ex parte Bledsoe (Ala.) 61 South. 813 (N. I. L.); Utah Banking Co. v. Newman (Utah) 138 Pac. 1146 (N. I. L.). See Cudahy Packing Co. v. State Nat. Bank, 134 Fed. 538, 67 C. C. A. 662, and Daniel, Neg. Inst. (5th Ed.) § 62, for a discussion and citation of the cases in jurisdictions where the N. I. L. was, or is, not in force, passing upon the negotiability of instruments which provide for the payment of costs of collection and attorney's fees, and upon the enforceability of such a provision. Mr. Daniel points out that the cases concerning the validity of stipulations for payment of attorney's fees are of four classes: (1) Those which sustain their validity, as well as the negotiability of the instrument; (2) those which sustain the validity of the stipulation, but not the negotiability of the instrument; (3) those which deny the validity of the stipulation, but sustain the negotiability of the instrument; (4) those which hold the stipulation void, and deny the negotiability of the instrument. In some states stipulations for payment of attorney's fees are declared illegal by statute. The N. I. L. § 2 (subd. 5), does not touch the question of the enforceability of a stipulation to pay costs of collection and an attorney's fee. Mechanics' American Nat. Bank v. Coleman, 204 Fed. 24, 122 C. C. A. 338 (N. I. L.).

⁹ Overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645.

¹⁰ 22 N. Y. 114, Moore Cases Bills and Notes, 53.

maker], * * * he [the treasurer] shall issue to the holder thereof ten shares in the capital stock," etc. There were thus two courses open to the holder of the instrument, but not to the maker. His promise for the payment of a sum of money was unconditional. He might not pay in money or in stock, but the holder might, at his option, surrender the note and take the stock, thus in no wise compromising the right of any holder to collect the full amount of money called for by the instrument.

This test determines the negotiability of that class of instruments payable in the alternative which are deemed by the courts absolute promises for the payment of money.¹¹ The courts declare that "the instrument is no less an absolute promise for the payment of money because it vests the holder with the option to take payment in something else than money." The reason is that the maker or party on whose credit the instrument circulates is absolutely bound, and bound, moreover, to pay money alone. As long as this is the obligation of the promisor, it would be inexpedient to deny the instrument the immunities of negotiability because of stipulations which are beneficial, and perhaps may add to its value. These stipulations vest in the promisee or person who discounts the bill or note the option whether he will enforce them or not. The maker, in every event, is bound absolutely to pay money.

Certainty as to Amount of Money

The last of the series of principles referring to the payment of money is that the order or promise must be for the payment of a definite sum of money.¹² By this is meant

¹¹ N. I. L. § 5 (subd. 4); *Kirk v. Dodge County Nat. Ins. Co.*, 39 Wis. 138, 20 Am. Rep. 39; *Heard v. Dubuque County Bank*, 8 Neb. 16, 30 Am. Rep. 811; *Owen v. Barnum*, 2 Gilman (Ill.) 461; *Preston v. Whitney*, 23 Mich. 280; *Dennett v. Goodwin*, 32 Me. 44. In *Hosstatter v. Wilson* it was held that a note promising to pay at a certain time in money (or in goods on demand) was a good promissory note. The maker has no election to do otherwise than to pay money, though the holder may elect to take goods. 36 Barb. (N. Y.) 307.

¹² N. I. L. §§ 1 (subd. 2), 2; *Cushman v. Haynes*, 20 Pick (Mass.) 132; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Dodge v. Emerson*, 34 Me. 96; *Jones v. Simpson*, 2 Barn. & C. 318; *Clarke v.*

that it must specify exactly the sum of money to which it relates. It would be useless in the operations of discount if the purchaser were obliged to have reference to extrinsic facts or to other documents, to ascertain its value.¹³ And accordingly, in the leading case upon the point,¹⁴ where the

Percival, 3 Barn. & Adol. 660; Aurey v. Fearnside, 4 Mees. & W. 168; Gilpin v. People's Bank, 45 Ind. App. 52, 90 N. E. 91. An obligation to pay "either £225 sterling or \$1,000 lawful money of the United States of America, to wit, £225 sterling if the principal and interest are payable in London, and \$1,000 lawful money of the United States of America if the principal and interest are payable in New York," is not negotiable. Parsons v. Jackson, 99 U. S. 434, 25 L. Ed. 457.

¹³ An instrument payable in installments is certain as to amount (N. I. L. § 2 [subd. 2]), even though the amount of each installment be within the maker's control, or within that of the holder. See p. 57, note 72, supra. An instrument payable in installments, with a proviso that upon default in one installment the whole sum shall become due, is held to be sufficiently certain as to amount. N. I. L. § 2 (subd. 3). See p. 58, note 73, supra. On the same reasoning a note containing a clause maturing it upon the default of the maker in the performance of the covenants of a collateral mortgage is held to be certain as to amount. See p. 58, note 73, supra. But, on the other hand, it has been held that an instrument payable at a specified time or earlier at the unconditioned option of the holder is not a note. See pp. 59, 60, notes 74-79, supra. In some of the cases reaching this conclusion the ground of decision has been uncertainty of amount. State Bank of Halstad v. Bilstad (Iowa) 136 N. W. 204, 207 (N. I. L.). It has, however, been held that a note was not made uncertain as to amount by a clause authorizing the payee bank to appropriate on the note, whether or not due, at any time, at its option, without notice or legal proceedings, any money which the maker may have in the bank, on deposit or otherwise. Louisville Banking Co. v. Gray, 123 Ala. 251, 26 South. 205, 82 Am. St. Rep. 120. See, also, Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356; Citizens' Bank of Los Angeles v. Jones, 121 Cal. 30, 53 Pac. 354; Commercial Nat. Bank of Chicago v. Brewing Co., 16 App. D. C. 186, 199, 202, 203. But see Roblee v. Union Stock Yards Nat. Bank, 69 Neb. 180, 95 N. W. 61.

¹⁴ Smith v. Nightingale, 2 Starkie, 375. Similarly, an instrument, otherwise in the form of a note, containing a promise to pay a specified sum "and the taxes" assessed against the holder on account of the debt evidenced by the instrument, is not a note. Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Carmody v. Crane, 110 Mich. 508, 68 N. W. 268; Brooke v. Struthers, 110 Mich. 582, 68 N. W. 272, 35 L. R. A. 536; Garnett v. Myers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; Consterdine v. Moore, 65 Neb. 291, 96 N. W. 1021,

instrument was in form to pay £65, "and also all other sums which may be due," Lord Ellenborough declared that since the total sum was not specified, and could not be ascertained otherwise than by reference to books to ascertain the amount due, and the whole constituted one entire promise, and could not be divided into parts, the instrument was too indefinite to be a promissory note. And the courts, in cases of orders or promises to pay "whatever sums you may collect,"¹⁵ or "the demands of a sick club,"¹⁶ or like indefinite amounts, have wisely denied to them the privilege of negotiability. This rule does not, however, exclude from negotiability paper payable "with interest,"¹⁷ or "with

101 Am. St. Rep. 620; Northern Counties Inv. Trust Co. v. Edgar. 65 Neb. 301, 91 N. W. 402, 96 N. W. 1022; Allen v. Dunn, 71 Neb. 831, 99 N. W. 680; SMITH v. MYERS, 207 Ill. 126, 69 N. E. 858, Moore Cases Bills and Notes, 58; Fidelity & Deposit Co. of Maryland v. Young, 159 Ill. App. 531. But a promise in a note to pay taxes thereon, and keep insured the property mortgaged to secure it, does not deprive the instrument of its status as a promissory note. Such a promise relates to the preservation of the security and is therefore a promise incidental to the principal promise to pay a sum certain. Frost v. Fisher, 18 Colo. App. 322, 58 Pac. 872; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; Bradbury v. Kinney, 63 Neb. 754, 89 N. W. 257; Kendall v. Selby, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697; THORP v. MINDEMAN, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003 (N. I. L.). Moore Cases Bills and Notes, 36; Barker v. Sartori, 66 Wash. 260, 119 Pac. 611 (N. I. L.).

¹⁵ Legro v. Staples, 16 Me. 252.

¹⁶ Bolton v. Dugdale, 4 Barn. & Adol. 619.

¹⁷ N. I. L. § 2 (subd. 1); Baumeister v. Kuntz, 53 Fla. 340, 42 South. 886 (N. I. L.). A provision in a note that, in case of nonpayment at maturity, interest from the date of the note, or a higher rate of interest, shall be paid, or that, in case of payment at maturity, the stipulated interest, or part of it, shall be remitted, does not make the amount to be paid at maturity uncertain. Such a provision either provides a penalty or offers a premium. If the former, it is unenforceable, and does not affect the sum payable; if the latter, notwithstanding the clause, the instrument during its currency shows on its face the sum certain payable at maturity, i. e., the sum specified less the premium. De Hass v. Roberts (C. C.) 59 Fed. 853; Parker v. Plymell, 23 Kan. 402; Towne v. Rice, 122 Mass. 67; Crump v. Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; SMITH v. CRANE, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20, Moore Cases

current exchange." ¹⁸ In the case of instruments payable with interest, an inspection of the paper enables the holder to ascertain just what sum is due upon it at any given time. Such instruments, therefore, specify a given sum of money as definitely as though they had stated the interest in figures.

Bills and Notes, 65; *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387; *Citizens' Bank v. Booze*, 75 Mo. App. 189; *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697; *Citizens' Sav. Bank v. Landis* (Okla.) 132 Pac. 1101. Contra: *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393; *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946; *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598. A stipulation that, upon default in the payment of an installment of interest, the interest in default shall bear interest as if principal, is unobjectionable. *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33, 105 Am. St. Rep. 381; *Brown v. Vossen*, 112 Mo. App. 676, 87 S. W. 577; *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611 (N. I. L.). Contra: *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719, *semble*. A provision for a discount at a specified rate, if the instrument is paid before maturity, does not make the amount payable uncertain. *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722. Contra: *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186, 46 L. R. A. 732, 76 Am. St. Rep. 594; *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177. Nor does a promise in a promissory note (certificate of deposit) payable on demand to pay interest from its date, if it is not presented for payment until after a stated period, make the sum payable uncertain. *Cate v. Patterson*, 25 Mich. 191; *HATCH v. FIRST NAT. BANK*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401, *Moore Cases Bills and Notes*, 49; *Re Baldwin's Estate*, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122; *Re Ellard*, 62 Misc. Rep. 374, 114 N. Y. Supp. 827.

¹⁸ A provision in a bill or note for the payment, in addition to the principal sum, of current exchange on a place other than the place of payment, is enforceable. *Pollard v. Herries*, 3 B. & P. 335; *Grutacap v. Woulluise*, 2 McLean, 581, Fed. Cas. No. 5,854; *Price v. Teal*, 4 McLean, 201, Fed. Cas. No. 11,417. But such a provision does not deprive the instrument of its character as a bill or note. N. I. L. § 2 (subd. 4); *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83; *Johnson v. Frisbie*, 15 Mich. 286; *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968, 21 L. R. A. 178, 40 Am. St. Rep. 315; *Clark v. Speen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337; *Haslach v. Wolf*, 66 Neb. 600, 92 N. W. 574, 60 L. R. A. 434, 103 Am. St. Rep. 736, 1 Ann. Cas. 384. Contra: *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *LOWE v. BLISS*, 24 Ill. 168, 76 Am. Dec. 742,

ures themselves. It has been held in some jurisdictions¹⁹ that an instrument payable with current exchange is invalid, because the fluctuations in the rate of exchange make it impossible, when the bill is issued, to ascertain the amount payable. But this view is rather of the letter of the law than of its spirit. The law merchant is the result of the custom of merchants, and the statute of Anne is the result of the law merchant. It is the custom, convenience, and

Moore Cases Bills and Notes, 63; Read v. McNulty, 12 Rich. Law (S. C.) 445, 78 Am. Dec. 467; Nicely v. Commercial Bank, 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. Rep. 245; Nicely v. Winnebago Nat. Bank, 18 Ind. App. 30, 47 N. E. 476; John Church Co. v. Spurrier, 20 Ind. App. 39, 50 N. E. 93. A provision for "current exchange" is meaningless in an instrument drawn and payable in the same place, and should not therefore in any jurisdiction affect the character of the instrument containing it. Hill v. Todd, 29 Ill. 101; Chandler v. Calvert, 87 Mo. App. 368, *semble*; Buck v. Harris, 125 Mo. App. 365, 102 S. W. 640; South Whitley Hoop Co. v. Union Nat. Bank (Ind. App.) 101 N. E. 824, *contra*. It has been held that a stipulation for current exchange, not expressly designating between what places, in a note dated in one state and payable in another, is also meaningless and cannot increase the amount payable. Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; First Nat. Bank of Galva v. Nordstrom, 70 Kan. 485, 78 Pac. 804; Clauser v. Stone, 29 Ill. 114, 81 Am. Dec. 299, *semble*. The decisions were made on the assumption that the payee resided at the place of payment. This assumption is, however, unwarranted. The stipulation in question indicates that the payee did not reside at the place of payment and that the exchange in contemplation was that between the place of date and the place of payment. Philadelphia Bank v. Newkirk, *supra*. These cases cannot be supported on the ground that there is no exchange between cities in the United States. Story, Bills, § 31. Nor can they be supported on the ground that there was no direct course of exchange between the place of making and the place of payment. There doubtless was an indirect course of exchange through a neighboring banking center, according to which the rate to be paid under the stipulation must be determined. Pollard v. Herries, *supra*. An instrument drawn and payable in the same place "*in exchange*" is defective as a bill or note, because not payable in money. First Nat. Bank of Brooklyn v. Slette, 87 Minn. 425, 69 N. W. 1148, 64 Am. St. Rep. 429; Chandler v. Calvert, 87 Mo. App. 368; Russell, Bills, pp. 50, 51. If an instrument payable "*in exchange*" were payable at a place other than the place of making, it might be construed as payable in money with exchange. Bradley v. Lill, 4 Biss. 473, Fed. Cas. No. 1,783.

¹⁹ See note 18, *supra*.

sound business policy of merchants to induct into negotiable instruments the theory of exchange, and this reason, therefore, if no other, makes exchange a necessary modification of the general rule we have laid down.

SPECIFICATION OF PARTIES

26. The instrument must be specific as to all its parties.
27. A note or bill must be signed by the maker or drawer.
28. The drawee of an unsigned bill, who writes his acceptance upon it, is chargeable upon the instrument as the maker of a note.
- 29a. A bill must be addressed to some person as drawee.
- 29b. If a bill be addressed to the drawer, the holder may charge the drawer-drawee upon the instrument either as a bill or a note.
- 29c. The drawer of an unaddressed bill may, it has been held, be charged upon it as the maker of a note.
- 29d. One who writes his acceptance upon an unaddressed bill, is chargeable upon the instrument as the maker of a note.
- 30a. A bill or note must be payable to a specified person, or to bearer.
- 30b. The maker, or the drawer, or the drawee may be designated as payee, or the same person may be drawer, drawee, and also payee. In such cases the instrument has no inception as an obligation until its indorsement and delivery by the payee.
- 30c. A bill or note is payable to bearer:
 - (a) When it is expressed to be payable to bearer;
 - (b) When it is payable to a person named therein or bearer;
 - (c) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;
 - (d) When the name of the payee does not purport to be the name of any person.

Signature of Parties

A person becomes a party to a bill or note by signing it as maker or drawer,²⁰ or by signing his acceptance²¹ or indorsement²² of it. A signature is usually made by the writing of the signer's name, but one may be made by the drawing of a mark or symbol adopted by the signer to represent his name; e. g., "1, 2, 8," may be a signature.²³ A signature may be affixed by means of pen, pencil,²⁴ stamp,²⁵ printing press,²⁶ or other effective instrument. The signature of a party need not be written under the words from which his liability upon the instrument arises. Thus a maker may affix his signature at the beginning of a note, instead of subscribing it in the usual manner. "I, A. B., promise to pay," etc., is as effective a signature by A. B. as "I promise to pay," etc., subscribed, "A. B."²⁷

Bill or Note must be Signed

An instrument, otherwise sufficient in form, is not a bill or note until it has been signed by the maker or drawer.²⁸ No person, therefore, is chargeable upon the paper as a bill or note. Since, however, informality in expression is not fatal, if the instrument satisfies the formal requisites of a bill or note, a person who writes an acceptance upon an un-

²⁰ N. I. L. § 1 (subd. 1).

²¹ N. I. L. § 182.

²² N. I. L. § 31.

²³ Brown v. Butchers' & Drovers' Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; George v. Surrey, Moody & M. 516; Shank v. Butsch, 28 Ind. 19. One may sign a trade or assumed name. N. I. L. § 18.

²⁴ Geary v. Physic, 5 Barn. & C. 234; Reed v. Roark, 14 Tex. 329, 65 Am. Dec. 127; Baker v. Dening, 8 Adol. & E. 94.

²⁵ Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879 (N. I. L.).

²⁶ Weston v. Myers, 33 Ill. 424. See N. I. L. § 191 (last par.).

²⁷ TAYLOR v. DOBBINS, 1 Strange, 399, Moore Cases Bills and Notes, 66. See N. I. L. § 17 (subd. 6); Germania Nat. Bank of Milwaukee v. Mariner, 129 Wis. 544, 109 N. W. 574 (N. I. L.).

²⁸ N. I. L. §§ 1 (subd. 1), 18.⁷ A note signed by two or more as makers, which reads, "We promise to pay," is the joint obligation of the signers. Barnett v. Juday, 38 Ind. 86; Groves v. Sentell, 153 U. S. 465, 14 Sup. Ct. 898, 38 L. Ed. 785. But where a note reading, "I promise to pay," is signed by two or more as makers, they are jointly and severally liable upon it. N. I. L. § 17 (subd. 7); Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180; Noble v. Beeman-Spaulding-Woodward

signed note obligates himself as maker of the instrument.²⁹ A reasonable interpretation of his acceptance is that he adopted the promise in the instrument as his own. Similarly, if the drawee of an unsigned bill write an acceptance upon it, he is chargeable upon the instrument as the maker of a note.³⁰ His acceptance indicates his intention to comply with the order in the instrument. The whole instrument evidences an intention on his part to pay the sum stated to the payee named at the time specified. It is, therefore, his promissory note.

Designation of Drawee

Without a drawee, an instrument cannot be a bill of exchange.³¹ The reason for this is that a bill is an order. The courts, however, are frequently able to sustain as a promissory note an instrument which for lack of a drawee is imperfect as a bill of exchange; for, where the essentials of a note are present, the courts will enforce the obligation in spite of formal inaccuracies. In PETO v. REYNOLDS,³² where an instrument otherwise in the form of a bill was not addressed to any one, but across the face was written "Accepted," over what purported to be the defendant's signature, Barons Parke and Alderson both agreed that, while they could not treat the instrument as a bill, because of the absence of the drawee's name, they would, on proof of the defendant's signature, hold it to be a promissory note.

Co., 65 Or. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162 (N. I. L.). An instrument in the form of a note, reading, "I, A., promise to pay," and signed, "A. or else B.," is not the note of B. Ferris v. Bond, 4 Barn. & Ald. 679. It seems, however, to be the several note of A., with B.'s guaranty written upon it.³³

²⁹ Block v. Bell, 1 Moody & R. 149.

³⁰ Drummond v. Drummond, Morrison's Dict. 1445; 1 Ames Cas. Bills & N. 883; Tevis v. Young, 1 Metc. (Ky.) 197, 71 Am. Dec. 474, contra.

³¹ N. I. L. § 1 (subd. 5). N. I. L. § 128, provides: "A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession." See Dugane v. Hoezda Pokroku No. 4 (Iowa) 119 N. W. 141.

³² 9 Exch. 410, Moore Cases Bills and Notes, 67. See Wheeler v. Webster, 1 E. D. Smith (N. Y.) 1.

The courts have even gone so far as to say that, if the drawee be not specified in the bill, but be otherwise capable of identification from it, that will suffice. In *Gray v. Milner*,³³ the bill was addressed, "Payable at No. 1 Wilmot St., opposite the Lamb, Bethnal Green, London," and the argument was that, not being addressed to any one, it was not a bill of exchange. It appeared, however, in answer to this, that "Accepted. Chas. Milner" was written across the face of the bill. The court held that this was a bill of exchange; Dallas, J., saying that the direction to a particular place could only mean to the person who resided there, and that the defendant, by accepting it, acknowledged that he was the person to whom it was directed. Of *Gray v. Milner* it may be said that it can only be supported upon the theory that a bill of exchange made payable at a particular place of residence or of business can only be meant to be addressed to the person who resides or does business at that place. But it may also be said that such is certainly a very strained construction of the law,³⁴ and it is to be questioned whether the courts would to-day adopt such a view of this rule if the case were presented to them afresh. It would seem that the acceptance evidences an intention to incur an obligation, and that the holder might treat the instrument as a promissory note, as suggested in *PETO v. REYNOLDS*.³⁵

An instrument in the form of a bill addressed to the drawer is not a bill. Since, however, the form of the instrument discloses an intention on the part of the drawer to assume an obligation to pay the sum specified to the payee named at the time stated, it is a promissory note. Thus in

³³ 8 *Taunt.* 739. An action was brought on the following writing: "Oct. 21, 1804. Two months after date, pay to the order of John Jenkins, £78, 11s. value received. Thos. Stephens. At Messrs. John Morson & Co." It was held that the instrument was a bill of exchange, and that Morson & Co. could be considered the drawees. *Shuttleworth v. Stephens*, 1 *Camp.* 407.

³⁴ *Davis v. Clarke*, 6 *Q. B.* 16; *Story, Bills* (Bennett's Ed.) 58; 1 *Para. Notes & B.* 62.

³⁵ 2 *Ames Cas. Bills & N.* p. 832.

FAIRCHILD v. OGDENSBURGH, C. & R. R. CO.,³⁶ the instrument was an order drawn by a railroad upon its treasurer directing the latter to pay A. B., or order, a certain sum of money, and was, in effect, an order of the corporation upon itself. Here the Court of Appeals said, because there were not the two parties requisite for a bill of exchange, the instrument was not a bill of exchange, but, following the authority of the English courts,³⁷ that it was a promissory note. The Negotiable Instruments Law provides that the holder may treat such an instrument either as a bill or a note.³⁸

It has been held that an unaddressed bill is the promissory note of the drawer.³⁹ But these decisions are unsound.⁴⁰ Such an instrument is in terms the order and not the promise of the drawer, and is therefore not his note. It is not a bill for want of a drawee. Since the drawer did not address the order to himself, the instrument cannot be regarded as a note under the doctrine of FAIRCHILD v. OGDENSBURGH, C. & R. R. CO., *supra*.

Designation of Payee

It is likewise essential to a bill of exchange or promissory note that a payee be designated therein, or that it be payable to bearer.⁴¹ In Gibson v. Minet,⁴² Chief Baron Eyre

³⁶ 15 N. Y. 337, 69 Am. Dec. 606, *Moore Cases Bills and Notes*, 69.

³⁷ *Miller v. Thomson*, 3 Manning & Gr. 576; *Allen v. Lea*, etc., *Ins. Co.*, 9 C. B. 574.

³⁸ *N. I. L.* § 130.

³⁹ *ALMY v. WINSLOW*, 128 Mass. 342, *Moore Cases Bills and Notes*, 72; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166; *Didato v. Coniglio*, 50 Misc. Rep. 280, 100 N. Y. Supp. 466 (*N. I. L.*).

⁴⁰ *Watrous v. Halbrook*, 39 Tex. 573; *FORWARD v. THOMPSON*, 12 U. C. Q. B. 103, *Moore Cases Bills and Notes*, 71.

⁴¹ *N. I. L.* §§ 1 (subd. 4), 8, 9. Thus an instrument in the form of a check, with a line drawn through the blank space left in the printed form for the name of the payee, is not a check for want of a payee. *GORDON v. LANSING STATE SAVINGS BANK*, 133 Mich. 143, 94 N. W. 741, *Moore Cases Bills and Notes*, 74. But a bill reading, "Pay to _____ order," is payable to the drawer's order. *Chamberlin v. Young*, [1893] 2 Q. B. 206 (B. E. A.). In *Smith v. Willing*, 123 Wis. 377, 101 N. W. 692, 68 L. R. A. 940, an instrument, writ-

⁴² 1 H. Bl. 618.

declared: "If I put in writing these words: 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date, for value received, and not say to whom, it is waste paper."⁴³ The payee must be certain; but any words which with reasonable certainty designate a person as payee are enough. An acknowledgment of a balance due A., for which "I promise to pay," is a promise to pay A.⁴⁴ It is not necessary, moreover, that the designation be by name, but a description of the payee is sufficient.⁴⁵ Thus "the trustees of the will of A.," or "the ad-

ten on a printed blank for a promissory note, reading, "I promise to pay to the order of \$2,500," was held not a note for want of a payee. Accord: *Workman v. Workman*, 168 Ill. App. 627; *Hilborn v. Pennsylvania Cement Co.*, 145 App. Div. 442, 129 N. Y. Supp. 957 (N. I. L.). But see *Weston v. Myers*, 33 Ill. 424. [An instrument payable to "A. et al." is not a bill or note.] *Gordon v. Anderson*, 83 Iowa, 224, 49 N. W. 86, 12 L. R. A. 483, 32 Am. St. Rep. 302. A. is the payee of an instrument reading, "Pay to the order of A.," as well as of an instrument reading, "Pay to A. or order," N. I. L. § 8. *Fisher v. Pomfret*, 12 Mod. 125. See p. 35, note 14, *supra*.

⁴³ *Walrad v. Petrie*, 4 Wend. (N. Y.) 576; *Ferris v. Bond*, 4 Barn. & Ald. 697; *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637; *Heman v. Francisco*, 12 Mo. App. 560.

⁴⁴ *Chadwick v. Allen*, 1 Strange, 706. In *Kessler v. Clayes*, 147 Mo. App. 88, 125 S. W. 799, the following instrument was held a note: "Good for \$1000 for 10 shares K. J. C. stock surrendered to the undersigned, J. D. Lucas, by the owner of said stock, J. Kessler, and for which I am liable. [Signed] Jos. D. Lucas." "As to the identity of the payee," said the court (147 Mo. App. 97, 125 S. W. 802), "it is sufficient if the note discloses from whom the consideration was received. In such circumstances, the promise is interpreted to be a promise to pay him from whom the consideration moved." In *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171 (N. I. L.), *Pryor v. Same*, 240 Ill. 100, 88 N. E. 288, and *Kavanagh v. Same*, 240 Ill. 100, 88 N. E. 288, it was held that the following note sufficiently designated F. E. Creelman as payee: "Bank of America. No. 22. F. E. Creelman has deposited in this bank \$2,500, payable in current funds six months from date, with interest at the rate of 3% per annum on return of this certificate properly indorsed. [Signed] R. H. Howe, A. Cashier." Accord: *Scantlebury v. Tallcott* (Sup.) 146 N. Y. Supp. 184 (N. I. L.), *semel*. See, also, *Equitable Trust Co. v. Harger*, 258 Ill. 615, 102 N. E. 209.

⁴⁵ N. I. L. § 8 (last par.); *Daniel, Neg. Inst.* § 90. *A fortiori*, a

ministrators of the estate of A.," are sufficient descriptions, since the payees are ascertainable.⁴⁶ The person designated, however, must have a natural or legal existence. For this reason a promise to pay to "the estate of Moses Lyon, deceased," has been held bad.⁴⁷ Not unlike this case is Cowie v. Stirling,⁴⁸ where a note was made payable nine months after date "to the secretary for the time being" of a certain society. This was construed as a promise to pay to the person who should be secretary nine months thence, and, inasmuch as it could not be ascertained at the date of issue who that person would be, it was held that the instrument could not take effect as a note.⁴⁹

designation of the payee by his trade name is sufficient, e. g., the designation of a bank by the name of its cashier. *Prima facie* a bill or note payable to "A., cashier," or "cashier of X. Bank," is payable to the bank and not to the cashier. N. I. L. § 42; President, etc., of Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; McBroom v. Corporation of Lebanon, 31 Ind. 268 (a note payable to "Treasurer of Lebanon Co."); Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193 (N. I. L.) (a note payable to "A., Pres."); Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 N. W. 165 (N. I. L.); Eades v. Muhlenberg Co. Sav. Bank, 157 Ky. 416, 163 S. W. 494 (non-negotiable note). Compare First Nat. Bank v. McCullough, 50 Or. 508, 98 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758 (N. I. L.). The N. I. L. § 42, provides that an instrument payable to "a person as 'cashier' or other fiscal officer of a bank or corporation" is *prima facie* payable to the corporation.

⁴⁶ Administrators of A., deceased, Adams v. King, 16 Ill. 169, 61 Am. Dec. 64; Moody v. Threkeld, 13 Ga. 55; trustees of the will of A., Megginson v. Harper, 2 Cromp. & M. 322; the heirs of A., Bacon v. Fitch, 1 Root (Conn.) 181.

⁴⁷ Hendricks v. Thornton, 45 Ala. 309. See, also, Lyon v. Marshall, 11 Barb. (N. Y.) 242. But in Shaw v. Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348, "Pay to F. B. Bridgeman's estate or order" was construed as an order to pay to the administrators—a construction which is certainly according to the common acceptance of the words used. Accord: Peltier v. Babilion, 45 Mich. 384, 8 N. W. 99.

⁴⁸ 6 El. & Bl. 333.

⁴⁹ But had the society been incorporated the instrument would have been a note under section 8 (subd. 6); N. I. L., which provides that a bill or note may be made payable to "the holder of an office for the time being." A note payable to A., secretary of an unincorporated association, or his successors, is payable to A. King v. Box, 6 Taunt. 325; Davis v. Garr, 6 N. Y. 124, 54 Am. Dec. 387; Whit-

Before the Negotiable Instruments Law an order or promise to pay to A. or B. was not a bill or a note, because the instrument is payable to either, only on the contingency of its not being paid to the other.⁵⁰ The act, however, changes the law by providing that a bill or note may be made payable to "one or some of several payees."⁵¹ Such instruments are to be distinguished from those in which the designation of the payees, though alternative in form, is not such in fact, as in *Holmes v. Jaques*,⁵² where the note was payable to "the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being." Such a note means, says Blackburn, J.: "I promise to pay to the trustees or their agents for the time being (the latter being what is implied by law), and I give notice that the treasurer is such agent."

An instrument in the form of a note made payable to the order of the maker, or in the form of a bill where the payee and acceptor, or the payee, drawee, and drawer, are one and the same person, is sufficient in form, as a note or bill.⁵³ But since a man cannot contract with himself, such a writing, unnegotiated, gives rise to no obligation.⁵⁴ If, how-

comb v. Smart, 38 Me. 264. Similarly, a note payable to A., or his heirs is payable to A. *Knight v. Jones*, 21 Mich. 161. See *Briggs v. Keplinger*, 159 Ill. App. 265.

⁵⁰ *Blanckenhagen v. Blundell*, 2 Barn. & Ald. 417; *Musselman v. Oakes*, 19 Ill. 81, 68 Am. Dec. 583. A note was held good where the promise was "to pay A., B., and C., or their order, or the major part of them." It was construed as a promise to pay to all three, or to the order of all three or of any two, the effect being that A., B., and C. were joint payees, but that any two were authorized to sign for all. *Watson v. Evans*, 1 Hurl. & C. 662. See, also, *Abcoldn v. Marks*, 11 Q. B. 19.

⁵¹ N. I. L. § 8 (subd. 5); *Union Bank of Bridgewater v. Spies*, 151 Iowa, 178, 130 N. W. 928 (N. I. L.); *Re Ellard*, 62 Misc. Rep. 374, 114 N. Y. Supp. 827 (N. I. L.); *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247 (N. I. L.); *Voris v. Schoonover* (Kan.) 138 Pac. 607 (N. I. L.). Of course, a bill or note may be payable to several as joint payees. N. I. L. § 8 (subd. 4). See *Park v. Parker* (Mass.) 103 N. E. 936 (N. I. L.).

⁵² L. R. 1 Q. B. Cas. 376. Compare *Noxon v. Smith*, 127 Mass. 485.

⁵³ N. I. L. § 8 (subds. 2, 3). *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. 126, 135, 111 C. C. A. 166 (N. I. L.).

⁵⁴ N. I. L. § 185 (last sentence); *Stouffer v. Curtis*, 198 Mass. 560,

ever, the payee negotiates the instrument, it becomes by his indorsement a valid note or bill in the hands of the holder.⁵⁵

Payable to Bearer

A bill or note is payable to bearer which is expressed to be so payable,⁵⁶ or which is payable to a specified person or bearer.⁵⁷ But an instrument payable "to the bearer A." is payable to A. and is not negotiable.⁵⁸ A bill or note in which the designation of the payee, e. g., "to the order of bills payable,"⁵⁹ "to the order of 1658,"⁶⁰ or "to the order of cash,"⁶¹ does not purport to be the name of any person, is also payable to bearer.⁶²

Same—Fictitious Payee

Bills and notes are sometimes made payable to the order of a fictitious payee;⁶³ and where such an instrument, pur-

⁵⁵ N. E. 180 (N. I. L.); *Marine Trust Co. v. St. James A. M. E. Church* (N. J.) 88 Atl. 1075 (N. I. L.).

⁵⁶ *Hooper v. Williams*, 2 Exch. 18; *Moses v. National Bank of Lawrence County*, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743; *Commonwealth v. Butterick*, 100 Mass. 12; *Sherman v. Goodwin*, 11 Ariz. 141, 89 Pac. 517, 520 (N. I. L.); *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.); *Hale v. Citizens' Bank (Ark.)* 163 S. W. 775.

⁵⁷ N. I. L. § 9 (subd. 1). A bill or note payable to the "holder" is payable to bearer. *PUTNAM v. CRYMES*, 1 McMUL. (S. C.) 9, 36 Am. Dec. 250, *Moore Cases Bills and Notes*, 7. See p. 35, note 14, *supra*.

⁵⁸ N. I. L. § 9 (subd. 2); *PUTNAM v. CRYMES*, 1 McMUL. (S. C.) 9, 36 Am. Dec. 250, *Moore Cases Bills and Notes*, 7; *Bitzer v. Wagar*, 83 Mich. 223, 47 N. W. 210; *Mudd v. Farmers' Bank (Mo.)* 162 S. W. 314 (N. I. L.). A note payable "to the order of J. C. J. or bearer" is payable to bearer. *Phoenix Nat. Bank v. Saucier*, 102 Miss. 293, 59 South. 91, *semble*.

⁵⁹ *Warren v. Scott*, 32 Iowa, 22; *Bloomingdale v. National Butchers' & Drovers' Bank*, 33 Misc. Rep. 594, 68 N. Y. Supp. 35.

⁶⁰ *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121; *Mechanics' Bank of New York City v. Straiton*, 3 Keyes (42 *N. Y.) 365.

⁶¹ *Willets v. Phoenix Bank*, *supra*.

⁶² *Cleary v. DeBeck Plate Glass Co.*, 54 Misc. Rep. 537, 104 N. Y. Supp. 831 (N. I. L.).

⁶³ N. I. L. § 9 (subd. 4).

⁶⁴ A bill or note is payable to a "fictitious person" not only when the name purporting to designate a payee does not designate any

porting to be indorsed by the person named as payee, passes into the hands of an innocent holder, the question arises as to what are his rights as against the original parties. The rule to be deduced from the authorities is that as against an acceptor, drawer, or maker, who had knowledge of the fictitious character of the payee, such an instrument, in the hands of an innocent holder, may be treated as valid, and (somewhat anomalously) as if payable to bearer; but that, if the original party was ignorant of the fictitious character, he cannot be charged.⁶⁴ Further, if the holder, when he received the instrument, knew that the name of the payee, and consequently the indorsement, was fictitious, he cannot recover against the acceptor or mak-

ascertainable person of that name, see *Clutton v. Attenborough*, [1897] App. Cas. 90 (B. E. A.); but also when it does designate a person not intended by the person making the instrument to have an interest in it. *Bank of England v. Vagliano*, [1891] App. Cas. 107; *Trust Company of America v. Hamilton Bank of New York*, 127 App. Div. 515, 112 N. Y. Supp. 84 (N. I. L.); *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780 (N. I. L.). "It has been held that a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and that where it has been negotiated by the maker it is deemed as against him to be a note payable to bearer. *Lewisohn v. Kent & Stanley Co.*, 87 Hun, 257, 33 N. Y. Supp. 826. But the correctness of this view seems very questionable * * * checks are frequently drawn in this way, and it appears to be the understanding of the business community that they require the indorsement of the executor or administrator." *Crawford, Anno. N. I. L.* (3d Ed.) p. 21. Bills and notes drawn payable to the estate of a deceased person are payable to his executors or administrators. *Feltier v. Babilon*, 45 Mich. 384, 8 N. W. 99; *Shaw v. Smith*, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348. See p. 85, note 47, supra. A bill or note drawn payable to a deceased person by name, who is supposed by the maker or drawer to be living, is payable to the executors or administrators of the supposed payee. *Murray v. East India Co.*, 5 B. & Ald. 204.

⁶⁴ *Minet v. Gibson*, 3 Term R. 481, affirmed house of lords, 1 H. Bl. 569; *Bennett v. Farnell*, 1 Camp. 130, 180; *Armstrong v. Pomroy Nat. Bank*, 46 Ohio St. 512, 22 N. E. 886, 6 L. R. A. 625, 15 Am. St. Rep. 655; *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. But see *Lane v. Krekle*, 22 Iowa, 399; *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

er, although the latter had knowledge of the facts when he accepted the bill or made the note.⁶⁵

The Negotiable Instruments Law⁶⁶ provides that "the instrument is payable to bearer * * * when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." This section is a codification of the pre-existing law,⁶⁷ except that an indorsement of the fictitious payee's name is not, it seems, necessary to the negotiation of the instrument. It is payable to bearer.⁶⁸ The English Bills of Exchange Act,⁶⁹ by enacting that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer," makes the knowledge of the person drawing or accepting the instrument of no consequence.⁷⁰

CAPACITY OF PARTIES

31. The capacity of parties is in general governed by the same rules as their power to make a contract. It is of two kinds:

- (a) Capacity to incur liability.
- (b) Capacity to transfer the instrument.

⁶⁵ Hunter v. Jeffery, Peake, Add. Cas. 146; Rand. Com. Paper (2d Ed.) § 163.

⁶⁶ N. I. L. § 9 (subd. 3).

⁶⁷ SEABOARD NAT. BANK v. BANK OF AMERICA, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 490 (N. I. L.), Moore Cases Bills and Notes, 78; Trust Co. of America v. Hamilton Bank of New York, 127 App. Div. 515, 112 N. Y. Supp. 84 (N. I. L.); Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780 (N. I. L.); Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (N. I. L.). See Tolman v. American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850 (N. I. L.).

⁶⁸ Boles v. Harding, 201 Mass. 103, 87 N. E. 481 (N. I. L.), semble. See Brannan, Anno. N. I. L. (2d Ed.) pp. 13, 166, 184, 195, 227, for the discussion by Professor Ames, Judge Brewster and Mr. McKeehan of this change in the law effected by N. I. L. § 9 (subd. 3).

⁶⁹ B. E. A. § 7 (3).

⁷⁰ Bank of England v. Vagliano, [1891] App. Cas. 107, reversing 23 Q. B. Div. 243, 22 Q. B. Div. 103 (B. E. A.); Clutton v. Attenborough, [1897] App. Cas. 90, affirming [1895] 2 Q. B. 707 (B. E. A.). Compare

32. The following classes of persons incur no liability⁷¹ though they may make a valid transfer⁷² of the instrument:

- (a) A person non compos mentis.⁷³
- (b) An infant.⁷⁴
- (c) In some jurisdictions, a married woman.⁷⁵
- (d) A corporation, when the act is ultra vires.⁷⁶

33. The following persons may transfer, but can incur only personal liability:

- (a) Executors.
- (b) Administrators.
- (c) Guardians.
- (d) Trustees.

The general principles governing the capacity of parties to contract are not changed in their application to bills and notes. A full discussion of that liability belongs more properly to a work upon the general subject of contracts than to a work of this character. The defenses of persons non compos mentis, infancy, coverture, and of transcending corporate powers, and their effect upon the position of the bona fide holder, will be considered to a limited degree later on. We speak here in a most general way of

Vinden v. Hughes, [1905] 1 K. B. 795 (B. E. A.); North & South Wales Bank v. Macbeth, [1908] App. Cas. 137 (B. E. A.).

⁷¹ Willard v. Crook, 21 App. D. C. 237 (N. I. L.), corporation, ultra vires; Oppenheim v. Simon Reigel Cigar Co. (Sup.) 90 N. Y. Supp. 355 (N. I. L.), corporation, ultra vires.

⁷² "The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon." N. I. L. § 22. Notwithstanding Mr. Crawford's intimation to the contrary, by his reference in his notes to this section (Crawford, Anno. N. I. L. [3d Ed.] p. 35) to the dictum in Roach v. Woodhall, 91 Tenn. 206, 213, 18 S. W. 407, 30 Am. St. Rep. 883, it seems clear that this section does not touch the question whether or not an infant indorser may avoid his transfer. See comment of Mr. McKeehan on section 22, reprinted in Brannan, Anno. N. I. L. (2d Ed.) pp. 28, 245, 246.

⁷³ See post, § 99.

⁷⁴ See post, § 94.

⁷⁵ See post, § 95.

⁷⁶ See post, § 96.

persons acting in a representative capacity as parties to negotiable paper.

Executors, administrators, guardians, and trustees occupy at least one general property relation in common: an estate is committed to them to apply. An executor or administrator is the hand of the court to collect property and pay debts. A guardian or trustee has, in addition to these functions, to hold property, and to keep it intact as far as in ordinary human prudence it can be done. They hold this property, as the law phrases it, in "autre droit," which means that they hold for others, and not in their own right. They are allowed by law to charge the estates left in their care with certain disbursements, which, in general, are those necessary to carry into force and effect the estates which they are to administer. But, aside from these, the estate cannot be bound. It cannot, for example, be bound by an executory contract. If the representative makes such a contract, the law, in order that the obligation may stand, rather than fall, holds the representative personally responsible, not the estate which he represents. Thus, in the case of the executory contract of negotiable paper, the law deems the descriptive character setting forth the representative character in which the party has signed as surplusage, and treats it as his personal obligation.⁷⁷ This principle is extended so far that an executor is not permitted to charge the estate, although he is expressly authorized to do so by the terms of the will under which he acts.⁷⁸ This, however, does not preclude the

⁷⁷ See *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; *Tuttle v. First Nat. Bank of Greenfield*, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420 (N. I. L.); *Stubbs v. Fourth Nat. Bank*, 12 Ga. App. 539, 77 S. E. 893. The main cases on this point are *Austin v. Munroe*, 47 N. Y. 360; *Ex parte Garland*, 10 Ves. 119; *Fairland v. Percy*, L. R. 3 Prob. & Div. 217; *Labouchere v. Tupper*, 11 Moore, P. C. 198; *Downs v. Collins*, 6 Hare, 418. See, also, *Thompson v. Whitmarsh*, 100 N. Y. 35, 2 N. E. 273.

⁷⁸ *Delaware, L. & W. R. Co. v. Gilbert*, 44 Hun, 201. Modified by *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493, which holds that, where a will directs an executor to carry on business, the funds of the estate in the business are bound in equity for the

power of transfer. If a bill or note be negotiable, it may be indorsed, but the executor, guardian, or trustee indorsing is personally liable unless he exempts himself by an indorsement without recourse.⁷⁹ The Negotiable Instruments Law, § 44, provides that, "where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal responsibility."

AUTHORITY OF AGENT

34. The power of persons to incur liability as parties to, and to transfer, negotiable instruments by the hands of others is governed by the general rules applicable to principals and agents.

EXCEPTION—An undisclosed principal cannot sue or be sued as a party to a negotiable instrument.

Signature by Agent—Liability

A person may become a party to, or transfer, a bill or note by the hand of an agent. Whether one whose name purports to have been signed by another as drawer, acceptor, maker, or indorser is liable as such depends upon the authority, express or implied, of the person who wrote the signature. If such authority existed, the principal, and he alone, is bound. No particular form of appointment is necessary, and the authority of the agent may be established as in other cases of agency.⁸⁰ For example, if a bill or note be drawn or indorsed "A. B. by C. D." or "A. B. by C. D., His Attorney," it appears clearly that A. B. is principal, provided C. D. had a right to sign A. B.'s name. So, also, where the form of signature is "C. D. for A. B."

payment of debts. It, however, admits that the executor is personally liable in the first event.

⁷⁹ *Rex v. Thom*, 1 Term R. 487; *Childs v. Monins*, 5 Moore, 282; *Harrison v. McClelland*, 57 Ga. 531; *Tryon v. Oxley*, 3 G. Greene (Iowa) 289; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Wisdom v. Becker*, 52 Ill. 346.

⁸⁰ N. I. L. §§ 19, 20.

or "C. D., Agent for A. B."⁸¹ If, however, C. D. had not authority, no person is bound on the instrument, for C. D., in the cases put, did not undertake to be bound. C. D. would, indeed, be liable, but only upon an implied warranty of authority, to the person to whom he delivered the instrument or the assignee of the latter's right of action, for the damages resulting from the breach.⁸² In cases of simple contract an undisclosed principal may take advantage of the act of an agent who has made a contract in his behalf, and may sue or be sued thereon; but this doctrine does not extend to instruments under seal, or to bills and notes. No person can be a party to a negotiable instrument unless he appears thereon to be such.⁸³ Therefore, if the signature be "C. D.," although he was in fact agent for A. B., evidence is not admissible to show that C. D. intended to bind A. B. And even if, under the same circumstances, the signature was written "C. D., Agent," the name of the principal being undisclosed, the word "Agent" is regarded as *descriptio personæ*, and C. D. is bound personally.⁸⁴ In many jurisdictions, however, in such a case, if the action were by one not a holder in due course against C. D., it would be a defense that C. D. and his transferee intended the signature "C. D., Agent," to

⁸¹ Daniel, Neg. Inst. § 298.

⁸² Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; White v. Madison, 26 N. Y. 117; Taylor v. Shelton, 30 Conn. 122. It seems that by Neg. Inst. L. § 20, the holder in such cases may sue the agent on the instrument, if he was not authorized to sign for the principal. Crawford, Anno. N. I. L. (3d Ed.) pp. 32, 33.

⁸³ N. I. L. § 18; Sifkin v. Walker, 2 Camp. 308; In re Adansonia Co., L. R. 9 Ch. 635; Grist v. Backhouse, 20 N. C. 496; Arnold v. Sprague, 34 Vt. 409; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225; Texas Land & Cattle Co. v. Carroll, 63 Tex. 51; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Hyde v. Paige, 9 Barb. (N. Y.) 150; Nash v. Towne, 5 Wall. (U. S.) 689, 18 L. Ed. 527; Mineral Belt Bank v. Elking Lead & Zinc Co., 173 Mo. App. 634, 158 S. W. 1066 (N. I. L.).

⁸⁴ N. I. L. § 20; Dayries v. Lindsly, 128 La. 259, 54 South. 791 (N. I. L.); Schumacher v. Dolan, 154 Iowa, 207, 134 N. W. 624 (N. I. L.) *semble*; Williams v. Robbins, 16 Gray (Mass.) 77, 77 Am. Dec. 396, *semble*; Anderton v. Shoup, 17 Ohio St. 125, *semble*; Anderson v.

bind C. D.'s principal. But the word "Agent" following C. D.'s signature is not notice of such an intention.⁸⁴

DELIVERY OF INSTRUMENTS

35. A bill or note is inoperative as against the drawer or maker until delivery.
36. Delivery means transfer of possession with intent to transfer title,⁸⁵ and is of two kinds:
 - (a) Actual delivery, which is effected by the manual passing of the instrument itself to the payee or his agent.

Pearce, 36 Ark. 293, 38 Am. Rep. 39; Stinson v. Lee, 68 Miss. 113, 8 South. 272, 9 L. R. A. 830, 24 Am. St. Rep. 257. But by custom the title, or name and title, of the fiscal or other officer of a bank or corporation, may be the name of the corporation. See p. 84, note 45, *supra*; N. I. L. § 42. Where that is the case, the writing with authority of such name and title is the signature of the corporation. *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731, 112 N. W. 165 (N. I. L.); *Citizens' Savings Bank v. City of Newburyport*, 169 Fed. 766, 95 C. C. A. 232 (N. I. L.); *La Normandie Hotel Co. v. Security Trust Co.*, 38 App. D. C. 187 (N. I. L.). Where the names of the agent and the principal both appear on the instrument, it is a question of construction whose signature it is. See *Chipman v. Foster*, 119 Mass. 189; *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078; *First Nat. Bank of Brooklyn v. Wallis*, 150 N. Y. 455, 44 N. E. 1038; *Dorris v. Cronan*, 149 Mo. App. 177, 129 S. W. 1014; *Citizens' Nat. Bank of Los Angeles, Cal., v. Ariss*, 68 Wash. 448, 123 Pac. 593; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811 (N. I. L.); *Western Grocer Co. v. Lackman*, 75 Kan. 34, 88 Pac. 527 (N. I. L.); *Dunbar Box & Lumber Co. v. Martin*, 53 Misc. Rep. 312, 103 N. Y. Supp. 91 (N. I. L.); *Germania Nat. Bank of Milwaukee v. Mariner*, 129 Wis. 544, 108 N. W. 574 (N. I. L.); *International Trust Co. v. Caroline*, 78 Misc. Rep. 179, 137 N. Y. Supp. 932 (N. I. L.); *Peabody School Furniture Co. v. Whitman*, 6 Ala. App. 182, 60 South. 470.

⁸⁴ *Mechem, Agency*, § 443; *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705. N. I. L. § 20, does not change the law in such jurisdictions. *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738 (N. I. L.); *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408 (N. I. L.).

⁸⁵ See p. 96, note 90, *infra*.

(b) **Constructive delivery**, which is effected by direction to a third person in actual possession of the instrument to deliver it to, or to hold it for, the payee.

37. **Delivery in escrow** means delivery to a third person to hold until a certain event happens, or a certain condition is fulfilled. A bill or note delivered in escrow becomes absolute in the hands of a bona fide purchaser for value, whether or not the event happens or the condition is fulfilled.

The inception of a note is defined by Judge Platt to mean "when it was first given, or when it first became the evidence of an existing contract."⁸⁷ It has no legal inception until it is delivered. The mere writing and signing of a bill or note, which the drawer or maker retains in his hands, forms no contract.⁸⁸ No person has then a right of action upon it any more than if it were blank paper. The inception of the paper is when there came into existence a right of action upon it. This is because while the note or bill is in the maker's hands, it can be erased, canceled, or revoked. It cannot, therefore, be an evidence of indebtedness until it is beyond such possibility. The decisive step for this is the delivery.⁸⁹

⁸⁷ Marvin v. McCullum, 20 Johns. (N. Y.) 288.

⁸⁸ N. I. L. § 16; Gale v. Miller, 54 N. Y. 536; Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57; Freeman v. Ellison, 37 Mich. 459; Woodford v. Dorwin, 3 Vt. 82, 21 Am. Dec. 573; Ward v. Churn, 18 Grat. (Va.) 801, 98 Am. Dec. 749; Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 11; Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319; Morris v. Butler, 138 Mo. App. 378, 122 S. W. 377 (N. I. L.); Barry v. Mutual Life Ins. Co. of New York, 211 Mass. 306, 97 N. E. 779 (N. I. L.); Atwood v. Atwood, 86 Conn. 579, 86 Atl. 29; Baker v. Hahn (Tex. Civ. App.) 161 S. W. 443. Compare Lysaght v. Bryant, 9 C. B. 45. See Irwin v. Deming, 142 Iowa, 298, 120 N. W. 645 (N. I. L.).

⁸⁹ N. I. L. § 16; Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70; Id., 79 N. Y. 167;

Two things must concur in a delivery. The first is the transfer, actual or constructive, of the possession of the instrument; the second, an intent to transfer the title on the part of the transferrer.⁹⁰ The minds of both parties, to this extent, must concur. This is the law laid down⁹¹ in a case where the question was whether a check for \$10,000 in gold left upon a clerk's desk, unknown to him, and without his consciously accepting it, was a delivery of it, and the court said it was not. And in a case where⁹² it was the intention to deliver the instrument left in escrow on the 1st of May, but on April 30th the transferrer died, it was held that there could have been no actual delivery nor intention to deliver the instrument. The necessary elements to a delivery were wanting. So where the payee of

Kinzie v. Farmers' & Mechanics' Bank, 2 Doug. (Mich.) 105; *Vinton v. Peck*, 14 Mich. 287; *Viets v. Silver*, 15 N. D. 51, 106 N. W. 35 (N. I. L.).

⁹⁰ The first and third sentences of section 16, N. I. L., provide: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * * But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." Under the sentence last quoted a holder in due course may recover upon a bill or note, although the instrument was stolen from the party sought to be charged. *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959 (N. I. L.); *Greeser v. Sugarman*, 37 Misc. Rep. 799, 76 N. Y. Supp. 922 (N. I. L.); *Poess v. Twelfth Ward Bank of City of New York*, 43 Misc. Rep. 45, 86 N. Y. Supp. 857 (N. I. L.), semble. This sentence has changed the law in some jurisdictions where it has been adopted. *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497; *Sheffer v. Fleischer*, 158 Mich. 270, 122 N. W. 543. A fortiori, a holder in due course may recover, although the instrument was transferred to him in breach of faith by one to whom the party sought to be charged delivered the instrument as a bailee for safe keeping. *Borough of Montvale v. People's Bank*, 74 N. J. Law. 464, 67 Atl. 67 (N. I. L.); *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923 (N. I. L.). In this respect also the sentence has changed in the law in a few jurisdictions where it has been adopted. *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1.

⁹¹ *Kinne v. Ford*, 52 Barb. (N. Y.) 196, affirmed 43 N. Y. 587. Compare *Barry v. Mutual Life Ins. Co. of New York*, 211 Mass. 306, 97 N. E. 779 (N. I. L.).

⁹² *Artcher v. Whalen*, 1 Wend. (N. Y.) 179.

a bill indorsed it, but died before delivering it, it was held that his executor, finding it among his papers, could not consummate the transfer by delivering it.⁹³ On the other hand, such acts as handing completed notes to the payee, who, though objecting to the form, retained them;⁹⁴ or depositing completed notes, properly addressed, in the post office;⁹⁵ or giving a duplicate bill in place of one lost, which the payee treated as an original,—have been held to constitute sufficient deliveries. It is to be noted, however, that the delivery need not be to the payee, nor need the intent of the transerrer to transfer title be communicated to him. For, as will be seen, a bill or note may be delivered in escrow, and take effect on performance of the condition, without knowledge or actual assent of the payee;⁹⁶ and a note delivered in a sealed envelope, to be opened after the maker's death, is operative, although the payee does not become aware of the existence of the note until after the death occurs.⁹⁷ The outward and visible indication of delivery is possession, because, in nine cases out of ten, where a man holds paper, he has a right to hold it. And the courts have, as we shall see, confirmed this business view accordingly, declaring that, when a bill or note is found in the hands of a payee, it will be presumed

⁹³ *Bromage v. Lloyd*, 1 Exch. 32. This action was in assumpsit on a note in writing, made by defendants, indorsed in blank by the payee, and, after the death of the latter, delivered to the plaintiffs by the payee's executrix, without her indorsement. It was held that those to whom the note was so delivered had no right to sue upon it, for a "transfer" was not effected thereby. In the case of a note signed in Florence, and mailed to the maker's brother in London, who there delivered it to the payee, it was contended that the cause of action arose in the former place, but it was held that no contract arose until its delivery, and that consequently the cause of action arose within the jurisdiction of such place of delivery. *Chapman v. Cottrell*, 18 Wkly. Rep. 843.

⁹⁴ *Bodley v. Higgins*, 73 Ill. 375.

⁹⁵ *Rex v. Lambton*, 5 Price, 428; *Kirkman v. Bank of America*, 2 Cold. (Tenn.) 397.

⁹⁶ *WORTH v. CASE*, 42 N. Y. 362, 2 Ames Cas. Bills & N. 878, *Moore Cases Bills and Notes*, 84.

⁹⁷ *WORTH v. CASE*, *supra*; *Dean v. Carruth*, 108 Mass. 242.

that it was legally delivered to him, and was in fact his.^{**} But this presumption may be rebutted.^{**}

Delivery may also be upon conditions.¹ Deliveries upon conditions are of two classes: delivery as an escrow, and delivery to the other party to the instrument upon a condition. Delivery as an escrow is defined² as a delivery to a third person, made to await the happening of an event, or performance of a condition, or some affirmative action on the part of the other party, before he is entitled to the absolute delivery of the instrument, as distinguished from the affirmative action of the party who delivers the instrument in escrow. The authorities agree that a delivery in escrow has two elements: It must be to some person not ultimately entitled to receive it; and the delivery must take effect and the title to the instrument pass the instant the condition of the escrow is fulfilled, even though the depositary has not formally delivered it to the person entitled to the possession.³ In these respects it is like the escrow of a deed, from the analogy of which it is in fact drawn. There are, however, these distinctions: A deed once delivered to be held in escrow by a third party, and wrongly passed on by him, is subject to defenses, even in the hands of a purchaser for value without notice, but a

^{**} N. I. L. § 16 (last sentence); *Griswold v. Davis*, 31 Vt. 390; *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Peets v. Bratt*, 6 Barb. (N. Y.) 662; *Chappell v. Bissell*, 10 How. Prac. (N. Y.) 274; *Marshall v. Rockwood*, 12 How. Prac. (N. Y.) 452; *Keteitas v. Myers*, 19 N. Y. 231; *Cordier v. Thompson*, 8 Daly (N. Y.) 172; *Mosk v. Stevens*, 45 Misc. Rep. 147, 91 N. Y. Supp. 903 (N. I. L.); *Baumeister v. Kuntz*, 58 Fla. 340, 42 South. 886 (N. I. L.), semble; *First Nat. Bank v. Stallo*, 160 App. Div. 702, 145 N. Y. Supp. 747 (N. I. L.). The same presumption arises where the instrument is in the possession, not of the payee or indorsee, but of a transferee without indorsement. *Colborn v. Arbecam*, 54 Misc. Rep. 623, 104 N. Y. Supp. 986 (N. I. L.).

^{**} *Scaife v. Byrd*, 39 Ark. 568; *Chandler v. Temple*, 4 Cush. (Mass.) 285; *Rhine v. Robinson*, 27 Pa. 30; *Jackson v. Roberts*, 1 Wend. (N. Y.) 478.

¹ *Bell v. Ingestre*, 12 Adol. & E. (N. S.) 319.

² *WORTH v. CASE*, 42 N. Y. 367, *Moore Cases Bills and Notes*, 84.

³ *Edw. Bills & N. § 243*; *Daniel, Neg. Inst.* 68, and cases cited; *Earl v. Peck*, 64 N. Y. 596.

negotiable instrument is not.⁴ A deed being delivered conditionally to the obligee, parol evidence that it was conditional is admissible.⁵

A delivery upon a condition is where the instrument is delivered to the payee, to be held by him pending some future event. So in *Benton v. Martin*⁶ the law was laid down that conditions might be affixed to the delivery of a note in the hands of a payee, which, as between the immediate parties, would be binding, and a defense.⁷ This does not apply to the bona fide holder.⁸ But the authori-

⁴ N. I. L. § 16 (3d sentence); *Daniel, Neg. Inst.* § 68; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Fearing v. Clark*, 16 Gray (Mass.) 74, 77 Am. Dec. 394; *Garner v. Fite*, 93 Ala. 405, 9 South. 367; *Graff v. Logue*, 61 Iowa, 704, 17 N. W. 171; *Borough of Montvale v. People's Bank*, 74 N. J. Law, 464, 67 Atl. 67 (N. I. L.); *Same v. Hackensack Trust Co.* (N. J.) 67 Atl. 69 (N. I. L.); *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923 (N. I. L.). The intimation to the contrary in *Settles v. Moore & Scobee*, 149 Mo. App. 724, 129 S. W. 455 (N. I. L.), is erroneous. *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1, contra. Against a holder not in due course a delivery in violation of the conditions of the escrow is a defense. *Carpenter v. Maloney*, 138 App. Div. 190, 123 N. Y. Supp. 61 (N. I. L.).

⁵ *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

⁶ 52 N. Y. 570.

⁷ N. I. L. § 16 (2d sentence); *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Hunter v. First Nat. Bank of Ft. Wayne*, 172 Ind. 62, 87 N. E. 734; *Shulman v. Damigo* (Sup.) 115 N. Y. Supp. 90 (N. I. L.); *SMITH v. DOTTERWEICH*, 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. (N. S.) 892 (N. I. L.); *Moore Cases Bills and Notes*, 87; *Niblock v. Sprague* (Sup.) 200 N. Y. 390, 93 N. E. 1105 (N. I. L.); *Newgrass v. Shulhof*, 128 N. Y. Supp. 664 (N. I. L.); *Young v. Hayes*, 212 Mass. 525, 99 N. E. 327 (N. I. L.); *Griggs v. Village of Red Jacket*, 171 Mich. 142, 137 N. W. 136; *Tovera v. Parker*, 35 Okl. 74, 128 Pac. 101 (non-negotiable note); *Horton v. Birdsong*, 35 Okl. 275, 129 Pac. 701; *Jones v. Citizens' Bank* (Okl.) 135 Pac. 373; *Gamble v. Riley* (Okl.) 135 Pac. 390 (N. I. L.); *Norman v. McCarthy* (Colo.) 138 Pac. 28 (N. I. L.). Compare *American Automobile Co. v. Perkins*, 83 Conn. 520, 77 Atl. 954 (N. I. L.); *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636 (N. I. L.). See *Gould v. Tilton*, 161 Ill. App. 142; *Copans v. Dougan* (Sup.) 139 N. Y. Supp. 427 (N. I. L.); *Waxberg v. Stappler*, 83 Misc. Rep. 78, 144 N. Y. Supp. 608 (N. I. L.).

⁸ N. I. L. § 16 (3d sentence). See p. 96, note 90, *supra*, and section 83, *infra*.

ties are not unanimous, many cases holding that the delivery cannot be upon condition, or in escrow, to the payee himself.⁹

DATE

38. A date in a bill or note is not necessary to its validity.

The date of an instrument is not so necessary to it in law, that its absence avoids the instrument. It is not an essential characteristic of the instrument, as other qualities are characteristic of the instrument or of its negotiability.¹⁰ For this reason the date may be supplied by parol,¹¹ the date of delivery being the day of date; or it may be antedated or postdated,¹² or, if the date be left blank, all parties are deemed to consent that the holder may fill up the blank with a date.¹³ Legally speaking, the chief impor-

⁹ Stewart v. Anderson, 59 Ind. 375; Clanin v. Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; Jones v. Shaw, 67 Mo. 667; Carter v. Moulton, 51 Kan. 9, 32 Pac. 633, 20 L. R. A. 309, 37 Am. St. Rep. 259. See 4 Am. & Eng. Enc. Law (2d Ed.) 205. But N. I. L. § 16 (2d sentence), authorizes a delivery to the payee upon condition or in escrow. See note 7, *supra*.

¹⁰ N. I. L. § 6 (subd. 1); Church v. Stevens, 56 Misc. Rep. 572, 107 N. Y. Supp. 310 (N. I. L.), *semble*; Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756 (N. I. L.), *semble*.

¹¹ N. I. L. § 17 (subds. 2 and 3); Cowing v. Altman, 71 N. Y. 441, 27 Am. Rep. 70; Davis v. Jones, 25 Law J. C. P. 91.

¹² N. I. L. § 12; Pasmore v. North, 13 East, 517; Frazier v. Trow's Printing & Bookbinding Co., 24 Hun (N. Y.) 281; Gray v. Wood, 2 Har. & J. (Md.) 328; McSparran v. Neely, 91 Pa. 17; Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Albert v. Hoffman, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043 (N. I. L.); Triphonoff v. Sweeney, 65 Or. 299, 130 Pac. 979 (N. I. L.); Hitchcock v. Edwards, 60 L. T. (N. S.) 636 (B. E. A.); Royal Bank v. Tottenham, [1894] 2 Q. B. 715 (B. E. A.).

¹³ Knisely v. Sampson, 100 Ill. 574; Mitchell v. Culver, 7 Cow. (N. Y.) 336. But N. I. L. § 13, provides: "Where an instrument expressed to be payable at a fixed period after date is issued undated * * * any holder may insert therein the true date of issue * * * and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date." Under this section,

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tance of a date is that it is presumptive evidence of the time of its actual execution,¹⁴ a presumption, however, which may be contradicted by parol evidence.¹⁵ Likewise the place of date is supposed to be contemplated by the parties as the place of payment,¹⁶ because, in the absence of all other guides to any information on this point, the courts turn to the instrument itself, and say the place of date is probably the place of residence of the parties, and it is reasonable to suppose that the parties contemplated the place of their residence as the place where the instrument was to be paid. It becomes important sometimes in determining whether the instrument is a foreign or inland bill or note,¹⁷ and where presentment and demand are to be made, or where notices of dishonor are to be sent, and questions of that character.¹⁸ These remarks are to be understood with some limitations. The date of a completed instrument cannot be changed unless by mutual consent without avoiding it.¹⁹ Neither must it be understood

which changes the law, the insertion without authority of a date other than the date of issue discharges the prior parties, *Bank of Houston v. Day*, 145 Mo. App. 410, 122 S. W. 756 (N. I. L.); except as against subsequent holders in due course.

¹⁴ N. I. L. § 11; *McQuillan v. Eckerson* (Mich.) 144 N. W. 510.

¹⁵ *Germania Bank of New York v. Distler*, 4 Hun, 633, affirmed in 64 N. Y. 642; *Drake v. Rogers*, 32 Me. 524; *Brewster v. McCardell*, 8 Wend. (N. Y.) 479. See N. I. L. § 30.

¹⁶ The dating of a promissory note is *prima facie* evidence of the place of payment, as it is presumptive evidence that the maker resides at the place of date. Where the maker is known to have a residence which is not changed when the note is payable, a regular demand must be made, regardless of the place of date. *Taylor v. Snyder*, 3 Denio (N. Y.) 145, 45 Am. Dec. 457. See, also, *Bank of Orleans v. Whittemore*, 12 Gray (Mass.) 469, 74 Am. Dec. 605. As to the presumption raised by the date as to the maker's residence, see *Smith v. Philbrick*, 10 Gray (Mass.) 252, 69 Am. Dec. 315; *Demand v. Burnham*, 133 Mass. 339.

¹⁷ N. I. L. §§ 129, 152. See pages 31-33, *supra*.

¹⁸ *Stewart v. Eden*, 2 Caines (N. Y.) 121, 2 Am. Dec. 222.

¹⁹ N. I. L. § 125 (subd. 1). See § 105, post. Where a note is intended to bear date as of its execution, but is wrongly dated by mistake, the mistake may be corrected, except as to an innocent purchaser who would be prejudiced. *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197.

that dating a note at a particular place makes that place the one at which payment should be demanded. It does not.²⁰ It merely is a presumption to guide the court. And, lastly, in practical affairs an instrument without date will not circulate, because neither banks nor merchants will discount it. The date, in most instances, determines when the instrument is to be paid. And unless it has a date, or one is agreed upon and inserted, it is impracticable as a circulating medium.

VALUE RECEIVED

39. Value received is not necessary to be expressed in a negotiable instrument.

The expression "value received" is an acknowledgment of the receipt of a consideration sufficient *prima facie* to support the contract, and make it a binding promise for the payment of money. It raises the various questions relating to consideration, which, so far as they pertain to the circulation of the instrument, are commented upon hereafter.²¹ In itself, with bills it means that a consideration has been received by the drawer of the payee, or by the acceptor of the drawer, according as the bill has or has not been accepted.²² With notes it implies a consideration received by the maker.²³ Indorsers, from the mere fact of their indorsement, are deemed to have received a consider-

²⁰ Anderson v. Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442. It is held in this case that where a note is not made payable at a particular place, and the owner has a known and permanent residence within the state, the holder is bound to make a demand at such residence in order to charge the indorser. Whoever takes such note is presumed to have made inquiry for the residence of the maker in order to know where to demand payment.

²¹ See post, § 111, et seq.

²² Grant v. Da Costa, 3 Maule & S. 351; Benjamin v. Tillman, 2 McLean, 213, Fed. Cas. No. 1,304; Highmore v. Primrose, 5 Maule & S. 65; Thurman v. Van Brunt, 19 Barb. (N. Y.) 409.

²³ Clayton v. Gosling, 5 Barn. & C. 361, 8 Dowl. & R. 110.

ation, each indorser from his immediate indorsee.²⁴ And thus the instrument in its circulation bears upon itself prima facie proof of a consideration received by any of the parties against whom it is sought to be enforced. The student must, however, note that, although these words are well-nigh universal in negotiable bills and notes, they are in no wise necessary to them.²⁵ Their omission is unimportant, because the negotiable instrument itself imports a consideration. A mere production of the instrument on a trial is prima facie proof of the fact that it was given for a sufficient consideration.²⁶

²⁴ N. I. L. § 24; Edw. Neg. Inst. § 439; Chit. Bills, 69; Story, Prom. Notes, 7, 81. See note 26, infra.

²⁵ N. I. L. § 8 (subd. 2); McLeod v. Hunter, 29 Misc. Rep. 558, 61 N. Y. Supp. 73 (N. I. L.); Clarke v. Marlow, 20 Mont. 249, 50 Pac. 713; Underhill v. Phillips, 10 Hun (N. Y.) 591; Arnold v. Sprague, 34 Vt. 402; People v. McDermott, 8 Cal. 288; Jennison v. Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; Dean v. Carruth, 108 Mass. 242.

²⁶ N. I. L. § 24; Underhill v. Phillips, 10 Hun (N. Y.) 591; Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Townsend v. Derby, 8 Metc. (Mass.) 363; Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490 (N. I. L.); Bringman v. Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845 (N. I. L.); Karsch v. Pottier & Stymus Mfg. & Imp. Co., 82 App. Div. 230, 81 N. Y. Supp. 782 (N. I. L.), semble; Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059 (N. I. L.); Moak v. Stevens, 45 Misc. Rep. 147, 91 N. Y. Supp. 903 (N. I. L.); Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607 (N. I. L.), semble; Royal Bank of New York v. Goldschmidt, 51 Misc. Rep. 622, 101 N. Y. Supp. 101 (N. I. L.), semble; Colborn v. Arbecam, 54 Misc. Rep. 623, 104 N. Y. Supp. 986 (N. I. L.); National Park Bank of New York v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927 (N. I. L.), semble; Joveshof v. Rockey, 58 Misc. Rep. 599, 109 N. Y. Supp. 818 (N. I. L.), semble; Ryan v. Sullivan, 143 App. Div. 471, 128 N. Y. Supp. 632 (N. I. L.); Sabine v. Paine, 148 App. Div. 730, 132 N. Y. Supp. 813 (N. I. L.); First Nat. Bank v. Stallo, 160 App. Div. 702, 145 N. Y. Supp. 747 (N. I. L.); Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88 (N. I. L.), semble; Marshall v. Thomas, 31 Ohio Cir. Ct. R. 363; Lynchburg Milling Co. v. National Exch. Bank of Lynchburg, 109 Va. 639, 64 S. E. 980 (N. I. L.); American Automobile Co. v. Perkins, 83 Conn. 520, 77 Atl. 954 (N. I. L.); Hawkins v. Windhorst, 82 Kan. 522, 108 Pac. 805 (N. I. L.); Utah Nat. Bank of Salt Lake City v. Nelson, 38 Utah, 169, 111 Pac. 907 (N. I. L.); Niles v. United States Ozocerite Co., 38 Utah, 367, 113 Pac. 1038 (N. I. L.), semble; Fassett v. Boswell, 59 Or. 288, 117 Pac. 302 (N. I. L.); Rhodes v. Guhman, 156 Mo. App. 344, 362, 137 S. W. 88 (N. I. L.). As to whether a non-negotiable bill or note, not re-

DAY'S OF GRACE

40. Days of grace are days added to the nominal time of payment of all bills or notes except those impliedly or expressly payable on demand, and are computed by excluding the day of date and including the day of payment.
- 40a. The Negotiable Instruments Law abolishes days of grace.²⁷

Originally, days of grace were days allowed the drawee or acceptor of a foreign bill by the holder to enable him to provide funds to meet the bill. They were days obtained by the drawee or acceptor through the grace of the holder. This was first custom, then law. These days are now extended to cases of negotiable inland bills and promissory

citing value received, is deemed *prima facie* to have been given for a consideration, see 4 Am. & Eng. Ency. Law (2d Ed.) 80, 187; Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459; Kinsella v. Lockwood, 79 Misc. Rep. 619, 140 N. Y. Supp. 513 (N. I. L.); Richards v. Levison (Sup.) 142 N. Y. Supp. 273 (N. I. L.); note 16, chapter I, *supra*. If the defendant in an action upon a negotiable bill or note relies upon want of consideration as a defense, the burden of proof to establish the defense is upon him. N. I. L. § 28; 8 Cyc. 225; Zimbleman & Otis v. Finnegan, 141 Iowa, 358, 118 N. W. 312 (N. I. L.); Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370 (N. I. L.); Home Building & Loan Ass'n of Joplin v. Barrett, 160 Mo. App. 164, 141 S. W. 723 (N. I. L.); Nicholson v. Neary (Wash.) 137 Pac. 492 (N. I. L.); Vaughan v. Bass (Ala.) 84 South. 543 (N. I. L.). *Contra*: Bringman v. Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845 (N. I. L.), *semble*; Lombard v. Bryne, 194 Mass. 236, 80 N. E. 489 (N. I. L.), *semble*; Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. Rep. 761, 18 Ann. Cas. 204 (N. I. L.); Richards v. Shaw, 77 N. J. Eq. 399, 77 Atl. 618 (N. I. L.), *semble*; Cawthorpe v. Clark, 173 Mich. 287, 138 N. W. 1075 (N. I. L.). See Brannan, Anno. N. I. L. (2d Ed.) p. 31, for a criticism of the first three cases cited as *contra*. The burden of proof to establish a failure of consideration is upon the defendant. N. I. L. § 28; 8 Cyc. 225; Lynds v. Van Valkenburg, 77 Kan. 24, 93 Pac. 615 (N. I. L.); Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. Rep. 761, 18 Ann. Cas. 204 (N. I. L.) *semble*; Columbian Conservatory of Music v. Dickenson, 158 N. C. 207, 73 S. E. 990 (N. I. L.).

²⁷ N. I. L. § 85.

notes as well as the foreign bills to which at first the custom was only applied. It extends under the common-law rules to all negotiable bills of exchange or notes,²⁸ except those wherein the instrument is made payable on demand,²⁹ or without specification of time, in which case on demand without grace is understood, or wherein grace is expressly waived. These common-law provisions are very generally modified by the statutes of various states. In some states, too, promissory notes are not entitled to grace. The doctrine is that they, not being negotiable in themselves, but being made so by statute, are not placed upon the footing of bills of exchange, unless the statute expressly gives them all the privileges of negotiability. But where the statute does place notes on the footing of bills of exchange, then grace follows as a matter of course. For the same reason non-negotiable instruments, unless by statute placed on the footing of negotiable instruments, are not entitled to grace.³⁰

The number of days allowed as grace is generally three,³¹ and is computed by adding them to the days, or

²⁸ In the case of *Oridge v. Sherborne*, which was an action on a promissory note payable in installments, it was held that the maker was entitled to the usual days of grace as each installment fell due. 11 Mees. & W. 374. And see *Perkins v. President, etc., of Franklin Bank*, 21 Pick. (Mass.) 483; *Mechanics' Bank at Baltimore v. Merchants' Bank at Boston*, 6 Metc. (Mass.) 13; *Wood v. Corl*, 4 Metc. (Mass.) 203. As to notes payable in installments, see *Coffin v. Loring*, 5 Allen (Mass.) 153. Checks are not entitled to days of grace. *Andrew v. Blachly*, 11 Ohio St. 89; *Johns. Cas. Bills & N.* 50.

²⁹ *HART v. SMITH*, 15 Ala. 807, 50 Am. Dec. 161, *Moore Cases Bills and Notes*, 227; *Trask v. Martin*, 1 E. D. Smith (N. Y.) 505; *Sommerville v. Williams*, 1 Stew. (Ala.) 484.

³⁰ Under the statute of 3 & 4 Anne, notes payable to a particular person, without "order," have been held entitled to grace. *SMITH v. KENDALL*, 6 Term R. 123, *Moore Cases Bills and Notes*, 4; *Duncan v. Maryland Savings Institution*, 10 Gill & J. (Md.) 299; *Cox v. Reinhardt*, 41 Tex. 591; *Dubuys v. Farmer*, 22 La. Ann. 478. *Luce v. Shoff*, 70 Ind. 152, contra. See *Rand. Com. Paper*, § 1057.

³¹ *Daniel, Neg. Inst.* § 622. Demand of payment on negotiable bills and notes cannot be legally made until the third day of grace. *Griffin v. Goff*, 12 Johns. (N. Y.) 423, *Johns. Cas. Bills & N.* 49. In the case of *Lenox v. Roberts* it was held that demand should be made on the third day, and notice of the maker's default be posted in time

months reckoned as calendar months, stipulated in the instrument.⁸² The day of date is excluded from the calculation and the day of payment included.⁸³ This computation by months does not take into account the varying length of the month. The time reckoned in months may be longer or shorter, according as there are more or less days in the month. It also does not take into account the fact that the last day of grace happens upon a non-business day. In this last event, though in case of all non-commercial instruments the time which must expire before suit can be brought against the debtor is extended to the next succeeding business day,⁸⁴ yet with negotiable instruments,

to go by the mail of the day after. *Lenox v. Roberts*, 2 Wheat. (U. S.) 373, 4 L. Ed. 264; *Bank of Alexandria v. Swann*, 9 Pet. (U. S.) 33, 9 L. Ed. 40.

⁸² *Thomas v. Shoemaker*, 6 Watts & S. 179; *McMurphy v. Robinson*, 10 Ohio, 496.

⁸³ *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 180; *Bellasis v. Hester*, 1 Ld. Raym. 280; *Campbell v. French*, 6 Term R. 212; *President, etc., of Hartford Bank v. Barry*, 17 Mass. 94; *Ripley v. Greenleaf*, 2 Vt. 129; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240, Johns. Cas. Bills & N. 57; *Henry v. Jones*, 8 Mass. 453; *Pearson v. Stoddard*, 9 Gray (Mass.) 199; *Wentworth v. Clap*, 11 Mass. 87, note. See N. I. L. § 86.

⁸⁴ *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530. In this case a postdated check was payable on the day of its date, without days of grace. As it fell due on Sunday, the question arose as to whether payment should be made on the previous Saturday or the Monday following. The following is a portion of the court's opinion: "When there are no days of grace, and the time for payment or performance specified * * * falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday." A bill or note falling due on Sunday, without days of grace, is payable on the following day. *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 452, 18 S. W. 743; 15 L. R. A. 639, 29 Am. St. Rep. 680; *Id.*, Johns. Cas. Bills & N. 53; *Barrett v. Allen*, 10 Ohio, 426; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240. N. I. L. § 85, which abolishes days of grace (see note 37, *infra*) by enacting that a bill or note is "payable at the time fixed therein without grace," provides: "When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on

under the common law, grace is not extended in this way. With them the days of grace end on the next preceding business day, because the debtor cannot compel the creditor to extend the indulgence which a custom of doubtful advantage has already attached to the paper.⁸⁵ This rule has been wisely modified by the statutes of many jurisdictions, where the day of payment has been declared to be the next succeeding secular or business day.⁸⁶ But, in the absence of any express statute, it is generally understood that the common-law rule would prevail. It is to be observed that by the Negotiable Instruments Law days of grace have been abolished.⁸⁷

Note on Collateral Agreements in Writing

I. **ON THE BILL OR NOTE ITSELF—"Marginal Memoranda."**—Several promises to do several acts integrated in a connected piece of writing evidence one contract; i. e., form the content of a single obligation. Thus: "I promise to pay A. or order \$100.00 on January 1, 1914. I promise to deliver him or his order 100 bushels of wheat. (Signed) B."—evidences the *single* contract of the promisor (B) to perform *two* acts. Since the promisor is obligated to perform two acts, one of which is not the payment of money, the writing is not a note (*supra*, p. 69). Similarly, a sentence in the form of a negotiable promissory note, written as the concluding sentence of an order for goods, whereby the customer promises to pay the person to whom the order is directed the price of the goods ordered, is only one part of the document, which as a whole may be interpreted to be not a note, but a conditional promise to pay upon the delivery of the goods.

Saturday when that entire day is not a holiday." See also N. I. L. § 194. For a statement of the manner in which these sentences have been modified in several states, see Brannan, *Anno. N. I. L.* (2d Ed.) pp. 98, 99. See, also, Professor Samuel Williston's discussion of the last sentence printed in 23 Harv. L. Rev. 603.

⁸⁵ *Bussard v. Levering*, 6 Wheat. (U. S.) 121, 5 L. Ed. 215; *Reed v. Wilson*, 41 N. J. Law, 29; *Kuntz v. Tempel*, 48 Mo. 71; *Farnum v. Fowle*, 12 Mass. 89, 7 Am. Dec. 35; *Barker v. Parker*, 6 Pick. (Mass.) 80; *President, etc., of City Bank v. Cutter*, 3 Pick. (Mass.) 414.

⁸⁶ *Rev. St. N. Y.* pp. 2506, 2507.

⁸⁷ N. I. L. § 85; *Demelman v. Brazier*, 193 Mass. 588, 79 N. E. 812 (N. I. L.); *Dunbar v. Commercial Electrical Supply Co.*, 32 Okl. 634, 123 Pac. 417. N. I. L. § 85, has been amended in some states so as to continue the allowance of days of grace on sight bills. See Brannan, *Anno. N. I. L.* (2d Ed.) p. 98.

Neyens v. Port, 46 Pa. Super. Ct. 428 (N. I. L.); *Neyens v. Hossack*, 142 Ill. App. 327; *State v. Mitton*, 37 Mont. 368, 96 Pac. 926, 127 Am. St. Rep. 732 (N. I. L.). See *Harvey v. Dimon*, 36 Pa. Super. Ct. 82 (N. I. L.). It is conceived that the parties may by several contemporaneous but separated collocations of words which purport, e. g., from their relative positions on the paper and their signatures, to be distinct pieces of writing, integrate, constitute, or state on a single piece of paper as many contracts, obligations, or propositions as there are separate pieces of writing. See *Brown v. City of Newburyport*, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495 (N. I. L.). But if one of such pieces of writing qualify the obligation apparently arising from another, i. e., amend its terms by excision or addition, or wholly or partially annul it, or vary its normal incidents, the relation of the two in sense is regarded as a sufficient reason for treating them as a single document evidencing one contract. See the amendment to section 10, N. I. L., adopted in Wisconsin, Gen. St. Supp. § 1675—10. Thus a memorandum of a collateral agreement on the margin or back of a bill or note is treated as part of it. Consequently a negotiable instrument is made non-negotiable by the marginal words "Not transferable." *Tanners' Nat. Bank of Catskill v. Lacs*, 136 App. Div. 92, 120 N. Y. Supp. 669 (N. I. L.); *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466, semble. The status of a bill or note may be destroyed by a marginal memorandum stipulating for a medium of payment other than money, *Jones v. Fales*, 4 Mass. 245; or making the amount to be paid uncertain, *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186, 46 L. R. A. 732, 76 Am. St. Rep. 594; or payable on a contingency only, *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *White v. Cushing*, 88 Me. 339, 34 Atl. 184, 32 L. R. A. 590, 51 Am. St. Rep. 402; *Allison v. Hollenbeck*, 138 Iowa, 479, 114 N. W. 1059 (N. I. L.); *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466, semble; *Heaton v. Ainley*, 108 Iowa, 112, 78 N. W. 798, semble. Compare *Nathan v. Ogdens*, 93 L. T. R. (N. S.) 553 (B. E. A.). Similarly the day of maturity may be accelerated or postponed by appropriate words in the margin, *Heywood v. Perrin*, 27 Mass. (10 Pick.) 228, 20 Am. Rep. 518; *Black v. Epstein*, 93 Mo. App. 459, 67 S. W. 736; and the amount payable increased or decreased, *Kurth v. Farmers' & Merchants' State Bank*, 77 Kan. 475, 94 Pac. 798, 15 L. R. A. (N. S.) 612, 127 Am. St. Rep. 428; *Washington Finance Co. v. Glass*, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.). Since, however, marginal notations of the amount of a note, and of the day it will mature, purport to be restatements of the amount and date written in the bill or note, they are not evidence of a collateral agreement qualifying the instrument, and if they differ from the amount or date in the instrument are disregarded. See section 17, N. I. L.; *Dark v. Middlebrook* (Tex.) 45 S. W. 963. The reason for treating distinct pieces of writing as parts of one document fails, however, when the parts of the piece of pa-

per on which they are written purport to be intended for severance. Consequently, a note between which and a contemporaneous related contract on the same paper there exists a line of perforations may be detached and enforced by a holder in due course against whom the defenses arising out of this collateral contract are not available. *New Bank of Eau Claire v. Kleiner*, 112 Wis. 287, 87 N. W. 1090 (N. I. L.); *Cedar Rapids Nat. Bank v. Barnes* (Tex.) 142 S. W. 632. If the bill or note has its inception before the collateral agreement is written upon it, however close their relation in sense, their separation in time precludes their treatment as one document constituting one obligation. Thus a marginal memorandum written on a bill or note after its inception accelerating or postponing its maturity (*Bowie v. Hume*, 13 App. D. C. 286, 309, 314), or changing the rate of interest (*Cambridge Savings Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193), is not an alteration, but is at most a collateral agreement enforceable, if at all, against the parties to it and purchasers with notice. But see *Farmers' Nat. Bank of Tecumseh v. McCall*, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217.

II. NOT ON THE BILL OR NOTE.—It is frequently stated that a bill or note and a contemporaneous agreement in writing between the same parties are parts of one instrument evidencing one contract. *Randolph, Commercial Paper*, § 197; 4 Am. & Eng. Ency. (2d Ed.) 144. See *Chitty, Bills*, *140; *Stat. Wis.* 1913, § 1675—17(8). See, also, the dicta in many of the cases cited in this note. But see 2 Parsons, Bills & Notes, 145; *Byles, Bills* (Sharswood, 6th Ed.) *99; *Farmers' Nat. Bank of Tecumseh v. McCall*, 25 Okl. 600, 106 Pac. 866, 867, 26 L. R. A. (N. S.) 217. It is true that several contemporaneous memoranda may together evidence one simple contract (*Browne, Statute of Frauds* [5th Ed.] § 348; 2 Sm. L. C. [7th Ed.] 259), and that one of several contemporaneous instruments may be interpreted in the light of the intention of the parties disclosed in the others (*Wigmore, Evidence*, § 2471). See *Cross v. Norton*, 2 Atkyns, 74. Neither of these rules, however, affords a foundation for the statement, because neither authorizes the treatment of two separate contracts as one. A bill or note is a formal contract, i. e., an obligation constituted by a compliance with certain formal requisites. So soon as a writing attains the form of a bill or note, and is delivered, it is, *ipso facto*, the obligation of the parties to it. Even if the parties express in a contemporaneous agreement in writing their intention to change or nullify the terms of the bill or note, or to interpolate new ones, the agreement is at most a separate and distinct contract, which, though enforceable against the parties to it and purchasers with notice of it, is still collateral to the bill or note and not part of it. 2 Ames Cases on Bills & Notes, p. 802. Thus: (1) The bill or note may be declared on as such, *Smalley v. Bristol*, 1 Mich. 153; 2 Parsons, Bills & Notes, 145, 537; even though the collateral agreement is referred to in it, *Jury v. Barker, Ellis, B. & E.* 459; *Byram v. Hunter*, 36 Me. 217; *Pitkin v. Frink*, 49 Mass. (8 Metc.) 12; Manufacturers' Commercial

Co. v. Klots Throwing Co., 170 Fed. 311, 95 C. C. A. 203; s. c., 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40. And the defendant cannot introduce the collateral agreement in evidence as part of the contract declared on, thereby causing a variance, Smalley v. Bristol, 1 Mich. 153; or compel the plaintiff to prove it, Lachenmaier v. Hanson, 196 Fed. 773, 116 C. C. A. 397. (2) The collateral contract, in event of its breach, is available to the defendant only as an affirmative defense, Maillard v. Page, L. R. 5 Ex. 312; Bradley v. Marshall, 54 Ill. 173; Boley v. Lake St. Elevated R. Co., 64 Ill. App. 305; Singer Mfg. Co. v. Haines, 36 Mich. 385; 2 Parsons, Bills & Notes, 537; or as a cause of action for damages, Pitkin v. Frink, 49 Mass. (8 Metc.) 12; or for an injunction, Hull v. Angus, 60 Or. 95, 118 Pac. 284 (N. I. L.). (3) It is available as a defense only where all the defendants are parties to it. Webb v. Splich, 13 Q. B. 886, 894; Trease v. Haggin, 107 Iowa, 458, 78 N. W. 58; Byles, Bills (Sharswood, 6th Ed.) 99; Edwards, Bills, § 164; 2 Parsons, Bills & Notes, 536, 537. See First Nat. Bank of Aspen v. Mineral Farm Consol. Mining Co., 17 Colo. App. 452, 68 Pac. 981. Compare Elmore v. Hoffman, 6 Wis. 67. (4) It is available only between the immediate parties or against a holder with notice of it. Maze v. Heinze, 53 Ill. App. 503; Men-denhall Lumber Co. v. State Bank of McHenry, 97 Miss. 648, 54 South. 883; Elmore v. Hoffman, 6 Wis. 68; Tranter v. Hibbard, 108 Ky. 265, 56 S. W. 169, semble; Byles, Bills (Sharswood, 6th Ed.) 99; 2 Parsons, Bills & Notes, 144, 145, 535; 2 Parsons, Contracts, 553. It is immaterial whether knowledge of the collateral agreement results from a reference on the face of the bill or note, or from other circumstances. Roblee v. Union Stockyards Nat. Bank, 69 Neb. 180, 95 N. W. 61. (5) Although the collateral agreement contains promises or conditions which, if incorporated in the bill or note, would deprive it of its negotiability: (a) The indorsee or bearer (as the case may be) may bring an action on the instrument as a bill or note in his own name. Boley v. Lake St. Elevated R. Co., 64 Ill. App. 305; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Cox v. Cayan, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585; Re Boyse, 33 Ch. Div. 612 (B. E. A.); Manufacturers' Commercial Co. v. Klots Throwing Co., 170 Fed. 311, 95 C. C. A. 203; s. c., 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40; Roblee v. Union Stockyards Nat. Bank, 69 Neb. 180, 95 N. W. 61. See Markey v. Corey, 108 Mich. 189, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698. And (b) if he acquired the bill or note as a holder in due course, his rights upon it are not subject to personal defenses other than those arising from the collateral agreement of which he had notice. Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Cox v. Cayan, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585. See Boley v. Lake St. Elevated R. Co., 64 Ill. App. 305; Biegler v. Merchants' Loan & Trust Co., 62 Ill. App. 560; Id., 164 Ill. 197, 45 N. E. 512; Zollman v. Jackson Trust & Savings Bank, 238 Ill. 290, 87 N. E. 297, 32 L. R. A. (N. S.) 858; Lachenmaier v. Hanson, 196 Fed.

773, 116 C. C. A. 897; *McClelland v. Bishop*, 42 Ohio St. 113, 122. It is frequently said that such promises or conditions in the collateral contract make the bill or note non-negotiable when the point really decided is that the plaintiff held the instrument subject to the defenses arising out of the collateral contract of which he had notice. See, for example, *Roblee v. Union Stockyards Nat. Bank*, 69 Neb. 680, 95 N. W. 61; *Manufacturers' Commercial Co. v. Klots Throwing Co.*, 170 Fed. 311, 95 C. C. A. 203; *s. c.*, 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40. (6) It has been held, however, that a covenant in a contemporaneous mortgage to pay the taxes upon the note as a credit of the payee, or upon the payee's interest in the mortgaged property, makes the note uncertain as to the amount payable and deprives it of its status as such. *Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; *Consterdine v. Moore*, 65 Neb. 291, 91 N. W. 399, 98 N. W. 1021, 101 Am. St. Rep. 620; *Northern Counties Inv. Trust v. Edgar*, 65 Neb. 301, 91 N. W. 402, 96 N. W. 1022; *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680. See, also, *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598. These decisions, it is submitted, are erroneous. *Des Moines Sav. Bank v. Arthur* (Iowa) 143 N. W. 556; *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247 (N. I. L.). See *Wilson v. Campbell*, 110 Mich. 580, 68 N. W. 273, 35 L. R. A. 544; *Cox v. Cayan*, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585.

For this reason, as well as for the reason that the ordinary stipulations of a mortgage purport to provide for the preservation of the security and its application in payment of the indebtedness secured, rather than to modify in any respect the obligation disclosed on the face of the bill or note: (1) Stipulations in a mortgage (conflicting with the terms of the note) that the indebtedness secured shall become due, upon default in the payment of interest, of an installment of principal, or of another note of the series secured by the mortgage, although authorizing foreclosure, have no effect whatever on the maturity of the note. Thus (a) the happening of the default described in the mortgage does not authorize an action on the note before its maturity according to its face. *White v. Miller*, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673; *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; *McMillan v. Grayston*, 83 Mo. App. 425; *Board of Trustees of Westminster College v. Peirsol*, 161 Mo. 270, 61 S. W. 811, *semble*; *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 32 Atl. 306, 29 L. R. A. 103, 61 Am. St. Rep. 746, *semble*; *Mallory v. West Shore H. R. R. Co.*, 35 N. Y. Super. Ct. 175, *semble*. Contra: *Darrow v. Scullin*, 19 Kan. 57 (Brewer, J.); *Wheeler & Wilson Mfg. Co. v. Howard* (C. C.) 28 Fed. 741 (Brewer, J.); *Chambers v. Marks*, 93 Ala. 412, 9 South. 74; *Creteau v. Foote & Thorne Glass Co.*, 40 App. Div. 215, 57 N. Y. Supp. 1103 (N. I. L.); *Schoomaker v. Taylor*, 14 Wis. 313, *semble*. See *Battery Park Bank v. Loughran*, 122 N. C. 668, 30 S. E. 17. Compare *Brownlee v. Arnold*, 60 Mo. 79 (dis-

approved in *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154. (b) Nor does it deprive the holder of his right to bring a separate action upon each note of a series as it matures according to its face, and compel him to bring but one action upon all the notes. *McClelland v. Bishop*, 42 Ohio St. 113. Contra: *Banzer v. Richter*, 68 Misc. Rep. 192, 123 N. Y. Supp. 678. (c) Nor does it begin the running of the statute of limitations against the notes of the series which have not matured according to their face. *Lawson v. Cundiff*, 81 Mo. App. 169; *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044. See *Haggard v. Sanglin*, 89 Wash. 151, 124 Pac. 373 (N. I. L.). (d) Nor does it mature the note, so as to deprive a subsequent transferee of the position of a holder in due course. *Taylor v. American Nat. Bank of Pensacola, Fla.*, 63 Fla. 631, 57 South. 678; *City Nat. Bank v. Goodloe-McClelland Commission*, 93 Mo. App. 123. Contra: *First Nat. Bank of Sturgis v. Peck*, 8 Kan. 660. (e) Nor does it compel presentation and notice of dishonor before the day of maturity on the face of the note. *McClelland v. Bishop*, 42 Ohio St. 113; *Trease v. Haggin*, 107 Iowa, 458, 78 N. W. 58, semble. Contra: *Noell v. Gaines*, 68 Mo. 649 (disapproved in *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; see, also, *McMillan v. Grayston*, 83 Mo. App. 425; *Lawson v. Cundiff*, 81 Mo. App. 169; *City Nat. Bank v. Goodloe-McClelland Commission*, 93 Mo. App. 123; *Board of Trustees of Westminster College v. Peirsol*, 161 Mo. 270, 61 S. W. 811); *Creteau v. Foote & Thorne Glass Co.*, 40 App. Div. 215, 57 N. Y. Supp. 1103. (2) If both note and mortgage provide for the acceleration of the maturity of the note, but upon different contingencies, in an action on the note the terms of the note are controlling. *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044; *Linam v. Anderson* (Ga. App.) 78 S. E. 424, semble. See, also, *Johns v. Rice* (Iowa) 145 N. W. 290 (N. I. L.). (3) If both note and mortgage provide for attorney's fees, but upon different contingencies, in an action on the note the terms of the note are controlling. *Morrison v. Ornbaum*, 30 Mont. 111, 75 Pac. 953 (N. I. L.). (4) If the mortgage is void, the note is nevertheless enforceable. *Fontaine v. Nuse*, 38 Tex. Civ. App. 358, 85 S. W. 852; *Foddrill v. Dooley*, 131 Ga. 790, 63 S. E. 350; *Reynolds v. Spencer*, 66 Ind. 145.

For the reason that the bill or note and the mortgage securing it are not parts of one instrument evidencing one contract, as well as for the reason that the covenants of the mortgage, so far as they provide for the preservation and enforcement of the security, are promises incidental to the principal obligation of the note (see p. 70, note 5, *supra*), and would not therefore, were they written on its face, deprive it of its status as a negotiable instrument (*Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697; *Campbell v. Equitable Securities Co.*, 17 Colo. App. 417, 68 Pac. 788; *Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536, semble. See *Farmer v. First Nat. Bank of Malvern*, 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79; *Strickland v. National Salt Co.*, 79 N. J. Eq.

182, 81 Atl. 828; *Id.*, 79 N. J. Eq. 223, 81 Atl. 832; *National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479), it is held that: (1) The covenants of title, not to commit waste, to make repairs, to keep insured, to pay taxes on the mortgaged premises, and to pay attorney's fees in case of foreclosure, do not violate the rule that a note must not contain a promise to do an act in addition to the payment of money. *Wilson v. Campbell*, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872; *Dumas v. People's Bank*, 146 Ala. 226, 40 South. 964; *Brewer v. Slater*, 18 App. D. C. 48; *THORP v. MINDEMAN*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, *Moore Cases Bills and Notes*, 36; *Farmers' Nat. Bank of Tecumseh v. McCall*, 25 Okl. 600, 106 Pac. 886, 26 L. R. A. (N. S.) 217; *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611; *Brooke v. Struthers*, 110 Mich. 582, 68 N. W. 272, 35 L. R. A. 536, semble; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803, semble; *Consterdine v. Moore*, 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620, semble; *Northern Counties Inv. Trust v. Edgar*, 65 Neb. 301, 91 N. W. 402, 96 N. W. 1022, semble; *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680, semble; *Des Moines Sav. Bank v. Arthur* (Iowa) 143 N. W. 556; *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247 (N. I. L.). Contra: *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598 (statutory), semble. (2) A stipulation that the holder may at any time, even before maturity, declare the indebtedness due and foreclose, if he deems himself insecure, does not make the note uncertain as to the time of payment. *Iowa Nat. Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237, contra. (3) The covenant to pay taxes on the mortgaged property and the proviso authorizing the holder to declare the principal sum due upon default do not make the note uncertain as to the time of payment or the amount to be paid. *Wilson v. Campbell*, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; *Frost v. Fisher*, *supra*; *Campbell v. Equitable Securities Co.*, 17 Colo. App. 417, 68 Pac. 788; *Bradbury v. Kinney*, 63 Neb. 754, 89 N. W. 257; *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; *THORP v. MINDEMAN*, *supra*; *Barker v. Sartori*, *supra*; *Brooke v. Struthers*, *supra*, semble; *Garnett v. Meyers*, *supra*, semble; *Consterdine v. Moore*, *supra*, semble; *Northern Counties Inv. Trust v. Edgar*, *supra*, semble; *Allen v. Dunn*, *supra*, semble. See, also, *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N. W. 157 (N. I. L.). Contra: *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598 (statutory), semble; *Nat. Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881. But a covenant in a mortgage to pay taxes upon the note as a credit of the holder, has been held, erroneously it is submitted, to deprive the note of its negotiability. *Brooke v. Struthers*, *supra*; *Garnett v. Meyers*, *supra*; *Consterdine v. Moore*, *supra*; *Northern Counties Inv. Trust v. Edgar*, *supra*; *Allen v. Dunn*, *supra*. Contra: *Des Moines Sav. Bank v. Arthur* (Iowa) 143 N. W. 556; *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247 (N. I. L.). See, also, *Wilson v. Campbell*, 110 Mich. 580, 68 N.

W. 278, 35 L. R. A. 544; *Cox v. Cayan*, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585.

Of course, a writing otherwise in the form of a bill or note may expressly incorporate another writing, the provisions of which are such that the two writings, taken as parts of one instrument, do not satisfy the formal requisites of a bill or note. Thus a note which incorporates the mortgage securing it, by making it "part hereof," may incorporate provisions which deprive the note of its status as a negotiable instrument. *Lockrow v. Cline*, 4 Kan. App. 716, 48 Pac. 720; *Chapman v. Steiner*, 5 Kan. App. 326, 48 Pac. 607; *Wistrand v. Parker*, 7 Kan. App. 562, 52 Pac. 59; *Wright v. Shimek*, 8 Kan. App. 350, 55 Pac. 484; *Jones v. Dulick*, 8 Kan. App. 855, 55 Pac. 522; *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779; *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697. But a reference to another writing, which does not incorporate it, does not affect the character of the bill or note, but operates only to give notice of the collateral agreement. Thus the words "as per memorandum of agreement," "in accordance with contract," "pursuant to written order," "given in connection with contract," "in compliance with vote of company," "according to letter," "on policy No. 33,386," "secured by mortgage," have been held not to effect an incorporation of the writing referred to, but merely to give notice of it. *Jury v. Barker*, Ellis, B. & E. 459; *Re Boyse*, 33 Ch. Div. 612 (B. E. A.); *Byram v. Hunter*, 36 Me. 217; *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661; *Bank of Sherman v. Apperson* (C. C.) 4 Fed. 25; *First Nat. Bank of Aspen v. Mineral Farm Consol. Mining Co.*, 17 Colo. App. 452, 68 Pac. 981; *Phelps & Bigelow Windmill Co. v. Honeywell*, 7 Kan. App. 645, 53 Pac. 488; *Boley v. Lake St. Elevated R. Co.*, 64 Ill. App. 305; *Biegler v. Merchants' Loan & Trust Co.*, 164 Ill. 197, 45 N. E. 512; *Zollman v. Jackson Trust & Savings Bank*, 238 Ill. 290, 87 N. E. 297, 32 L. R. A. (N. S.) 858; *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698; *First Nat. Bank of Richmond, Ind., v. Badham*, 86 S. C. 170, 68 S. E. 536, 138 Am. St. Rep. 1043; *Hull v. Angus*, 60 Or. 95, 118 Pac. 284 (N. I. L.); *Lachenmaier v. Hanson*, 196 Fed. 773, 116 C. C. A. 397. Compare *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19; *Metcalf v. Draper*, 98 Ill. App. 399. The result is the same in such cases as where the holder received notice of the collateral agreement in any mode other than an inspection of the bill or note; i. e., he takes subject to defenses arising out of it (*Boley v. Lake St. Elevated R. Co.*, 64 Ill. App. 305), but not to other personal defenses (*Littlefield v. Hodge*, 6 Mich. 326). It has been held that the words "subject to contract" effect an incorporation of the writing referred to. *American Exchange Bank v. Blanchard*, 7 Allen (Mass.) 333; *Dilley v. Van Wie*, 6 Wis. 209; *McComas v. Haas*, 107 Ind. 512, 518, 8 N. E. 579; *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293; *Reed v. Cossatt*, 153 Pa. 156, 25 Atl. 1074 *semble*; *Klots Throwing Co. v. Manufacturers' Commercial Co.*, 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40. See *Rieck v. Daigle*

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17 N. D. 365, 117 N. W. 346; Pope & Ballance v. Righter-Parry Lumber Co., 162 N. C. 206, 78 S. E. 65 (N. I. L.). But in all of these cases except American Exchange Bank v. Blanchard, *supra*, the only point ruled was that the holder, since he had notice, took subject to defenses arising out of the collateral agreement referred to. The words "subject to conditions of contract" have been held to make a note conditional on its face. *Titlow v. Hubbard*, 68 Ind. 6; *Re Boyse*, 33 Ch. Div. 612 (B. E. A.), *semble*; *Rieck v. Daigle*, 17 N. D. 365, 117 N. W. 346, *semble*; *Hull v. Angus*, 60 Or. 95, 118 Pac. 284 (N. I. L.), *semble*. *Contra*, *Littlefield v. Hodge*, 6 Mich. 326.

CHAPTER III

ACCEPTANCE OF BILLS OF EXCHANGE

- 41. Definition.
- 42-45. Acceptance According to Tenor.
- 46. Who may Accept.
- 47. Delivery.
- 48-49. Forms and Varieties of Acceptance.
- 50. Implied Acceptance.
- 51-52. Acceptance on Separate Paper.
- 53. Parol Acceptance of a Bill.
- 54-54a. Acceptance for Honor or Supra Protest.
- 55. Time Allowed for Acceptance.

DEFINITION

41. **'An acceptance is an undertaking by the drawee to pay the bill when due.'**¹

It will perhaps help the student to understand the theory of acceptance to present it to him as a phase of the elementary theoretical notion of a contract as constituted by an offer and acceptance.

The acceptance is the assent to the proposition contained in the draft, which on its part is an offer, and which offer and assent, taken together, constitute a contract right or relation. In its practical aspect as a contract, it obviates the transfer of cash by means of credit. By way of illustration: C. owes A. A., we may assume, says to B., "Give me cash for my debt, and treat the debt itself as cash." B. agrees to this proposition, and A. gives, as an evidence of the transfer of the debt to B., the ordinary draft, making him the payee. B. then turns over this evidence of indebtedness, and the right of action along with it, to D., and D., on his part, to E. E. now comes with the paper to C. At this point the relation of the parties is as follows: The

¹ N. I. L. § 132.

right A. had to the debt of C. is now held by E. in the shape of a piece of commercial paper, which E. is about to present to C. A. is liable to B. for the £1,000 B. paid A.; B., on his part, is liable to D. for the £1,000 paid by D. to B.; and D. to E. As yet C. owes nothing to B., D., or E., and he only owes A. for the debt he owed him in the first place. The paper in E.'s hands has been passing from hand to hand, and used for the payment of debts, and accepted as such upon the supposed solvency of each person who has held and indorsed it. C. now says, "Yes, I will pay this £1,000"; and evidences his assent by writing on the bill "Accepted" over his own signature. At that moment he enters into a contract relation with the holder of the bill that he will pay it.² In other words, C. promises B., D., and E., and each of them severally, that he will pay £1,000 to the holder. Thus, B., D., and E. may look to either C. or A. for the £1,000 they have expended, but the condition implied is that B., D., and E., inasmuch as they have paid A. for C.'s debt, will look to C. to pay first, and, if C. does not pay, then they will look to A. This is the practical aspect of the theory of acceptance.

It follows that the drawee, until acceptance, is a stranger to the bill.³ In *Swope v. Ross* the drawee, who had not

² The acceptance is probably not complete, however, until delivery in jurisdictions in which the Negotiable Instruments Law is not in force; but under section 191 of the act acceptance is complete without delivery if it be communicated. See p. 128, note 37, infra. As to the irrevocability of an acceptance, see *Trent Tile Co. v. Ft. Dearborn Nat. Bank*, 54 N. J. Law, 33, 23 Atl. 423.

³ *Swope v. Ross*, 40 Pa. 186, 80 Am. Dec. 567; *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464; *Bellamy v. Majoribanks*, 8 Eng. Law & Eq. 523; *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Attleborough v. Mackenzie*, 36 Eng. Law & Eq. 562; *Desha v. Stewart*, 6 Ala. 852; *Tyler v. Gould*, 48 N. Y. 682; *Bullard v. Randall*, 1 Gray (Mass.) 605, 61 Am. Dec. 438; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Bank of Laddonia v. Bright-Coy Commission Co.*, 139 Mo. App. 110, 120 S. W. 648 (N. I. L.). Under N. I. L. § 132, the drawee is a stranger to the bill until he accepts in writing. *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182 (N. I. L.); *Dugane v. Hvezda Pokroku No. 4 (Iowa)* 119 N. W. 141 (N. I. L.); *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064 (N. I. L.); *Faircloth-Byrd Mercan-*

accepted a bill, discounted it before maturity, and the argument was that, in thus cashing it, he had paid it. But the court said it was neither acceptance nor was it payment, unless such was the express intention of the parties. In United States Nat. Bank of Vale v. First Trust & Savings Bank of Brogan,⁴ the drawee authorized a prospective indorsee over the telephone to accept for him in writing on the bill, which was done. It was held that the rule of agency that one party to a contract cannot be the agent of the other to sign for him without the full knowledge of the principal prevented this from being an acceptance signed by the drawee, and the drawee was consequently not liable as acceptor. So that if a drawee receives and discounts a bill for the drawer, and then discounts it away, the drawer and not the acceptor, is the person who must ultimately pay the bill.⁵ But the drawee upon acceptance, in the order of liability, becomes the principal debtor. He is precisely like the maker of a promissory note. This means that all parties may look to him to pay the instrument, that no demand need be made of him, and that notice of dishonor to him is unnecessary—all matters of moment in business affairs.⁶

tile Co. v. Atkinson, 167 Ala. 344, 52 South. 419 (N. I. L.); Izzo v. Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744, affirmed 178 N. Y. 621, 70 N. E. 1100 (N. I. L.); Lawson v. Layton & Layton (Del.) 86 Atl. 105 (N. I. L.); Rambo v. First State Bank, 88 Kan. 257, 128 Pac. 182 (N. I. L.); Sheets v. Coast Coal Co., 74 Wash. 327, 133 Pac. 433 (N. I. L.) resemble. Under similar statutes before the N. I. L. the same result was reached. Dickinson v. Marsh, 57 Mo. App. 566. The same rule applies to checks under N. I. L. § 185, providing that a check is a bill of exchange drawn on a bank payable on demand. Baltimore & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837 (N. I. L.).

⁴ 60 Or. 266, 119 Pac. 343 (N. I. L.).

⁵ Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464; Winter v. Dry, 5 N. Y. 525; Duncan v. Berlin, 60 N. Y. 151.

⁶ Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95, which contains cases on this point; Foden v. Sharp, 4 Johns. (N. Y.) 183; Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; Russell v. Phillips, 14 Q. B. 891; JARVIS v. WILSON, 46 Conn. 90, 33 Am. Rep. 18, Moore Cases Bills and Notes, 5; Cox v. National Bank of New York, 100 U. S. 712, 25 L. Ed. 739.

With these shifts of liability on the part of the drawee before and after acceptance, there is a corresponding change of liability on the part of the drawer. If the drawee refuses to accept, after having promised so to do, the drawer may either sue him directly upon the promise for all loss occasioned,⁷ or he may fall back upon their original relation for his remedy. If it was debt, as in the case we put, he must sue on the indebtedness. In such a case, too, as we have already shown, all prior parties must look to the drawer to be repaid the moneys they have expended on taking the bill. The drawer remains, at all times, the principal debtor on the bill. On the other hand, upon acceptance the drawer is relieved from primary liability upon the bill, and stands as to the other parties to the instrument in the position of first indorser. He is liable to pay the bill if the acceptor does not. A glance at the example will show the fairness of this. A. received from B. cash for a debt C. promised to pay; B. received cash from D.; and D. from E. If C. fails in his promise, the cash received should be refunded in the order it was paid. This would leave the controversy as it ought to be between C. and A.

So far as classification is concerned, acceptances may be classified according to their essential elements, and according to their technical form. In their essential elements, acceptances are analogous to the acceptances of offers in ordinary contract law. As with the acceptance of the offer in the ordinary contract,⁸ the acceptance of the bill of exchange must, in every respect, meet and correspond with the terms contained in the bill itself. It must neither fall within or go beyond these terms, but must exactly meet

⁷ *Ilsley v. Jones*, 12 Gray (Mass.) 280; *Riggs v. Lindsay*, 7 Cranch, 500, 3 L. Ed. 419; *Van Wart v. Woolley*, 5 Dow. & R. 374; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

⁸ *Potts v. Whitehead*, 23 N. J. Eq. 512; *Ellason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 558; *Eads v. City of Carondelet*, 42 Mo. 113; *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858; *Siebold v. Davis*, 67 Iowa, 580, 25 N. W. 778; *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557; *Clark*, Cont. p. 36.

them at all points.⁹ In technical phrase, it must be according to the tenor of the bill. Again, as with the ordinary contract,¹⁰ an offer made to one person cannot be accepted by another. The drawee, or some person who, in view of law, is the same as the drawee, must be the acceptor.¹¹ In their technical form, acceptances may be express or constructive, oral or written.¹² Express acceptances are those expressed in the words of the drawee; constructive, those implied from his acts. Written acceptances are assents written either upon the bill itself, or upon a piece of paper separate from the bill. The common, general principles governing the detail of form of a written acceptance are that it need not be dated; it may be accepted by the drawee in any name he chooses to adopt;¹³ it may be placed upon a bill before it has been signed by the drawer, or after it is overdue, or after dishonor.¹⁴ With these general observations as to the nature and form of acceptances, let us turn and examine more carefully their specific details.

⁹ See post, § 42.

¹⁰ Price v. Easton, 4 Barn. & Adol. 433; Leake, Cont. 481; Tuttle v. Catlin, 1 D. Chip. (Vt.) 366, 12 Am. Dec. 691; Rossman v. Townsend, 17 Wis. 95, 84 Am. Dec. 733; Ross v. Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646; Ellison v. Jackson Water Co., 12 Cal. 542; Seaman v. Whitney, 24 Wend. (N. Y.) 260, 35 Am. Dec. 618; Fugure v. Mutual Soc. of St. Joseph of Burlington, 46 Vt. 362; Haskett v. Flint, 5 Blackf. (Ind.) 69, 33 Am. Dec. 452; Clark, Cont. p. 508.

¹¹ See post, § 46.

¹² Sturges v. Fourth Nat. Bank of Chicago, 75 Ill. 595, Johns. Cas. Bills & N. 69; Dull v. Bricker, 76 Pa. 255; Averill v. Wood, 78 Mich. 342, 44 N. W. 381; Peterson v. Hubbard, 28 Mich. 197; Grant v. Shaw, 16 Mass. 341, 8 Am. Dec. 142; Wells v. Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.

¹³ Lindus v. Bradwell, 5 C. B. 591; Alabama Coal Min. Co. v. Brainard, 35 Ala. 476; Nicholls v. Diamond, 9 Exch. 154. See N. I. L. §§ 18, 43.

¹⁴ N. I. L. § 138. London & Southwestern Bank v. Wentworth, 5 Exch. Div. 96; Harvey v. Cane, 34 Law T. (N. S.) 64.

ACCEPTANCE ACCORDING TO TENOR

42. The acceptance must be absolute and according to the tenor of the bill to bind all the parties to it.
43. **THE TENOR OF THE BILL**—Is the request in the bill to pay the money at the time and place and in the manner mentioned in it. A change in the acceptance in any one of these respects renders the acceptance “qualified.”
44. The payment of the bill by the acceptor may be made dependent on a condition. It is then called “conditional” acceptance.
45. A qualified or a conditional acceptance is only valid—
 - (a) As to all parties subsequent to the acceptance.
 - (b) As to all prior parties who, upon due notice, assent.

The general principle is that, for an instrument or an act to be an acceptance, it must be according to the tenor of the bill.¹⁸ The promise must be to pay all the money called

¹⁸ N. I. L. § 132. *Wegersloffe v. Keene*, 1 Strange, 214; *BOELIM v. GARCIAS*, 1 Camp. 425, note, *Moore Cases Bills and Notes*, 92. This was on a bill, “payable in effective and not in vals reals.” The drawee offered to accept payable in vals denaros, but this was refused. It was held that the plaintiff had a right to so refuse, and that the proposed acceptance was not a sufficient acceptance of a bill drawn as was this one. The acceptance should have been general. *Gibson v. Smith*, 75 Ga. 34; *Shackelford v. Hooker*, 54 Miss. 716. In *PET-IT v. BENSON*, the acceptance was, “I do accept this bill to be paid half in money and half in bills.” It was held that a partial acceptance would charge the acceptor, but also that it might be refused and protested by the one to whom the bill was due, so as to charge the first drawer. Comb. 452, *Moore Cases Bills and Notes*, 92. In an action upon a bill of exchange, it was held that, where the day of payment was past at the time of acceptance, an agreement to pay secundum tenorem et effectum bilie was equivalent to a general acceptance, for the reason that it was then impossible to pay as is directed in the bill. *Jackson v. Pigott*, 1 Ld. Raym. 364; *Ford v. Angelrodt*, 37 Mo. 50, 88 Am. Dec. 174, *Johns. Cas. Bills & N.* 76; *Swope v. Ross*, 40 Pa. 186, 80 Am. Dec. 567. A telegram in response to an inquiry whether the defendant would pay a certain bill read:

for in the bill, for, if a bill be accepted for only part of that sum, it would result in splitting up the right of action on the bill, part being chargeable to the acceptor, and part to the drawer; it would necessitate a partial protest for non-acceptance and for non-payment; and lastly, on payment, the drawee would be entitled to demand the possession of the bill, and his possession of it would be presumptive evidence of the payment of the whole bill, though he has in fact paid only part of it. These, of course, are grave reasons against such an instrument acting as a circulating medium. So, also, equally grave business objections exist against modifying the assent to the bill, as to the time, place, or manner of its payment, or making its payment conditional. For if, in the illustration at page 116, the bill was a 6-months bill, and B., D., and E. were indorsers upon it, and the bill were payable in Jamaica, B., D., and E., as indorsers, might make all their calculations to pay the money at that time and place if C., the acceptor, did not. It would therefore be an injustice and hardship to B., D., and E. if C. were to accept the bill in three months, payable at London, England, because, if C. did not pay at that time and place, the holder might sue B., D., and E., who had every right to expect that they would not be called upon to pay until after the expiration of 6 months, and then at Jamaica. Thus such a rule is necessary to protect the other parties to the bill. And, taking all things into consideration, it is wiser to disallow than to allow them.

But the student must not understand that such an acceptance is not binding upon the drawee. It is enforceable between the acceptor and the holder, notwithstanding the

"Will pay M.'s draft on me two fifty for horses." It was contended that the word "for horses" made the acceptance conditional, but the court held that they were a mere statement of the consideration, and that the telegram was a general acceptance. *State Bank of Beaver County v. Bradstreet*, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. (N. S.) 747 (N. I. L.). A "general acceptance" of an order payable on a contingency evidences a promise to pay upon the happening of the contingency, but not otherwise. *Hannay v. Guaranty Trust Co. of New York* (C. C.) 187 Fed. 686; *Ross v. W. D. Cleveland & Sons* (Tex. Civ. App.) 133 S. W. 315.

fact that the drawer and indorsers are discharged. Moreover, where such an acceptance does not prejudice the rights of the drawer and indorsers, that is, where the qualification is immaterial or is assented to by them, they are not discharged.¹⁶ Parties subsequent to the qualified acceptance of course enter into the contract on the basis of the acceptance as qualified and are bound by it. Parties prior to it, who assent, waive their right to object. The materiality of an alteration in the tenor of the bill is well brought out in two cases, one of which was where the draft was addressed to Cobourg, and accepted payable at Port Hope, a town some miles distant;¹⁷ in the other, where the bill

¹⁶ In *Smith v. Abbott* the defendant accepted a bill to pay when the goods for which it was drawn were sold. As the plaintiff submitted, this was held good, though the plaintiff might have refused such acceptance, and have protested the bill. 2 Strange, 1152. In *Walker v. Atwood* a bill without a day of payment was accepted by the drawee to be paid on a certain date after it was presented. Although bills without such date when payable are due at sight, in an action against the acceptor the acceptance was held good. Yet by the acquiescence of the holder in the qualified acceptance prior holders would have been discharged. 11 Mod. 190. *Shackelford v. Hooker*, 54 Miss. 716, Johns. Cas. Bills & N. 78. "An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn." N. I. L. § 139. If the acceptor desires to qualify his acceptance, he must do so in clear and unequivocal terms, so that any person taking the bill could, if he acted reasonably, understand that it was subject to a qualification. Thus where a bill of exchange was drawn by L. Delobbel Flipo, payable "to the order of L. Delobbel Flipo only," and was stamped by the drawees across the face of the bill, "Accepted payable at Alliance Bank London for" the drawees, and above these words the drawee wrote, "In favor of L. Delobbel Flipo only. No. 28"—it was held, Lords Bramwell and Morris dissenting, that in view of the context, the words "in favor of Mr. L. Delobbel only" did not constitute a qualification of the acceptance, and the acceptance was therefore general. *Meyer v. De croix* [1891] A. C. 520 (B. E. A.). See, also, *Lehnhard v. Sidway*, 160 Mo. App. 83, 141 S. W. 430 (N. I. L.). It would seem that there may be a qualified acceptance of a non-negotiable bill. *Knefel v. Flanner*, 166 Ill. 147, 46 N. E. 762.

¹⁷ *Niagara Dist. Bank v. Fairman & W. Machine Tool Mfg. Co.*, 31 Barb. (N. Y.) 403. But see *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

was drawn payable in New York generally, and accepted payable "at Continental Bank, New York."¹⁸ In this last case the fixing or designating a specific place in the city to which the bill was addressed was no hardship—no material change; while compelling an indorser to be ready at some distant place was a hardship and a material change.

There is a further distinction maintained by the authorities, which is perhaps rather of form than of substance. Where the acceptance varies the offer contained in the bill as to the time, place, or mode of payment, it is a qualified acceptance.¹⁹ Where, however, a variation is introduced into the acceptance of the bill in the nature of a condition, the acceptance is called "conditional."²⁰ In the last class of cases the plaintiff as a part of his case must show that the condition has been performed before the liability of the acceptor can be deemed to have accrued.²¹ A common example of this is an acceptance to pay "when in funds,"²² which means that when the acceptor has cash which the drawer has a right to demand and receive he will then pay the bill.²³ This manner of acceptance, as well as the qualified one, creates a new contract, and is governed by the rules and reasons we have just laid down. The holder may elect to reject it altogether, and at once give notice either

¹⁸ *Troy City Bank v. Lauman*, 19 N. Y. 477. "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere." N. I. L. § 140. "An acceptance is qualified which is * * * local; that is to say, an acceptance to pay only at a particular place," etc. *Id.* § 141.

¹⁹ N. I. L. §§ 139, 141; *Byles, Bills*, 316; *Story, Bills*, § 204; *Daniel, Neg. Inst.* § 515.

²⁰ N. I. L. § 141, classes qualified acceptances as (1) conditional; (2) partial; (3) local; (4) qualified as to time; and (5) where the acceptance is of some, but not all, of the drawees.

²¹ *Gammon v. Schmoll*, 5 Taunt. 344; *Nagle v. Homer*, 8 Cal. 358; *Read v. Wilkinson*, 2 Wash. C. C. 514, Fed. Cas. No. 11,611; *Gooding v. Underwood*, 89 Mich. 187, 50 N. W. 818; *Ferguson v. Davis*, 65 Mich. 677, 32 N. W. 892; *Storer v. Logan*, 9 Mass. 55; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 73 C. C. A. 515; *Crutchfield v. Martin*, 27 Okl. 784, 117 Pac. 194.

²² *Smith v. Abbott*, 2 Strange, 1152; *Marshall v. Clary*, 44 Ga. 513.

²³ *Wintermute v. Post*, 24 N. J. Law, 420; *Campbell v. Pettengill*, 7 Greenl. (Me.) 126, 20 Am. Dec. 349; *Owen v. Lavine*, 14 Ark. 389.

of non-acceptance or of protest, or he may, if willing to accept the offer, give notice to prior parties, and they in turn may assent to it, and thus become bound.²⁴ This is, however, not always the rule with regard to the drawer as a prior party. If, as is sometimes the case, the drawer makes a draft upon a drawee without having a right to do so, there is no more reason why the courts should release him from his contract than that they should seek to protect him by giving him notice of dishonor in case of a refusal to accept or to pay. In both cases the holder is injured by the act of the drawer, and is held bound.²⁵

WHO MAY ACCEPT

46. The only person permitted by the law merchant to be an acceptor is the person to whom the bill is addressed. Another person is liable only upon a collateral undertaking.

EXCEPTION—An acceptor for honor.

The arbitrary custom of merchants is said by the courts to be the reason of this rule.²⁶ Though it is not the language of the courts, yet it so coincides with the fundamental theory of contracts that we add as an additional reason that

²⁴ "When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto." N. I. L. § 142.

²⁵ Daniel, Neg. Inst. § 511.

²⁶ See N. I. L. § 132. The drawee cannot make one of the other parties to his contract his agent to accept for him. Where drafts on defendant bank were presented at plaintiff bank, the vice president of plaintiff bank, with the verbal authority of the cashier of the defendant bank received over the telephone, wrote, "O. K. by Tschirgi, Cashier, 11/22/10," it was held that this was not an acceptance by the drawee, for one of the parties could not be the agent of the other party to accept for him without the full knowledge of the principal. This was therefore not an acceptance under section 132, N. I. L., requiring the acceptance of a bill to be signed by the drawee. United States Nat. Bank of Vale v. First Trust & Savings Bank of Brogan, 60 Or. 266, 119 Pac. 343 (N. I. L.).

no person other than the drawee can be acceptor, because such a person would be in a measure a stranger to the contract.²⁷ He is not, as appears from the face of the instrument, indebted to, nor has he funds of, the drawer. It is true, his intention may have been to signify to the parties to the bill that he was willing to pay and would pay the instrument. But he was not the person to whom the proposition or on whom the order was made. He was not a party to the contract. If the courts were to treat him as an acceptor, they would make a contract for the drawer with a party with whom, as far as it can be gathered from the bill, the drawer had no intention of contracting. This, though somewhat vaguely stated, seems to be the underlying principle in *Walker v. Bank of State of New York*.²⁸ In that case the bill was addressed to Mr. E. C. Hamilton, of New York, and was "accepted payable at American Ex. Bank. [Signed] Empire Mills. By E. C. Hamilton, Treas." The question was whether this was an acceptance, and the court said this was an acceptance of the Empire Mills, not a party to the contract. This point is brought out more clearly in some of the English cases. In *Jackson v. Hudson*²⁹ a bill was addressed to Mr. I. Irving, and accepted, "I. Irving. Joseph Hudson." This was a case of a sale of goods to Irving. Hudson accepted, by way of making the acceptance doubly sure. But Lord Ellenborough said Hudson's undertaking was a collateral one. Yet, whatever its effect, it was not an acceptance.³⁰ This rule is subject to exceptions, to-

²⁷ *HEENAN v. NASH*, 8 Minn. 407 (Gill. 363), 83 Am. Dec. 790, Moore Cases Bills and Notes, 93; Johns. Cas. Bills & N. 65; Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268.

²⁸ *Walker v. Bank of State of New York*, 13 Barb. (N. Y.) 636; *Id.*, 9 N. Y. 582.

²⁹ *Jackson v. Hudson*, 2 Camp. 447.

³⁰ *Davis v. Clarke*, 6 Q. B. 16. In this case the maker drew a bill of exchange payable to himself or order, and addressed also to himself, and a third party wrote his name under the word "Accepted." It was held that such third party could not be sued as an acceptor, on the ground that he was not the acceptor of a bill of exchange directed to him. See, also, *Steele v. McKinlay*, 5 App. Cas. 754; *Jenkins v. Coomber*, [1898] 2 Q. B. 168; *May v. Kelly*, 27 Ala. 497; *Wal-*

some of which we have before called attention. We have seen that if it were clear to whom the bill is meant to be addressed, and the acceptance is made by such a person, then the acceptance is sufficient. This is based upon the case of *Gray v. Milner*,⁸¹ where an instrument was addressed "Payable at No. 1 Wilmot St.," and the words "Accepted, Charles Milner," were treated as a proper acceptance, because such an address could only mean the person residing there. This rule has been followed in this country, and it is now probably the law. In addition to this exception, there are others. A draft may be accepted by the drawee in a name other than the one used in the draft, if there was a misnomer of the drawee and it was accepted by the person to whom it was intended to be addressed.⁸² The acceptor for honor—a branch of this subject to be discussed later on—is also a modification of this rule. Besides these instances, an agent may accept for and in the name of the principal,⁸³ but not in his own name, because that is his individual acceptance, and not the acceptance of the drawee.⁸⁴ If the bill be addressed to the agent, he cannot accept

ton v. Williams, 44 Ala. 347. But *Jackson v. Hudson*, 2 Camp. 447, might now, it seems, be decided differently in both England and the states which have adopted the N. I. L., and the defendant would be held as an irregular indorser. *Glenie v. Bruce-Smith*, [1908] 1 K. B. 263; *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136. See p. 190, note 35, *infra*.

⁸¹ *Gray v. Milner*, 8 Taunt. 739. See criticism of this case, ante, p. 82.

⁸² *Hascall v. Life Ass'n of America*, 5 Hun (N. Y.) 151. See N. I. L. § 43.

⁸³ *Thom. Bills*, 211.

⁸⁴ *Daniel, Neg. Inst.* § 487. A bill was directed to an unincorporated company, and was accepted for it by one of its members, who signed as manager. In an action on this it was claimed that such acceptance did not bind the party accepting, because he had no authority. This, however, was held not to affect his personal liability, as it was shown that he was one of those associated under the name of the company to whom the bill was directed. *Owen v. Van Uster*, 20 Law J. C. P. 61. To the same purpose, see *Nicholls v. Diamond*, 9 Exch. 154.

it in behalf of his principal.⁸⁵ An acceptance in blank, where the bill is incomplete, and is afterwards to be filled in, is valid.⁸⁶

DELIVERY

47. An acceptance is probably complete only upon delivery.⁸⁷

It is maintained by Professor Ames that an acceptance is complete without delivery because, as he says, the delivery of a bill or note is necessary only for the purpose of creating or transferring title;⁸⁸ and an acceptance has no effect upon the title to the bill, and is, therefore, complete the moment it is written upon the bill, *animo contrahendi*. In support of this position he cites *Wilde v. Sheridan*.⁸⁹ In this case the question was whether the judge of the Norfolk county court, whose jurisdiction was local and dependent upon the accrual of the cause of action within the county, had jurisdiction over a case where the defendant signed an acceptance in London, England, and sent it by mail to Norwich, Norfolk county. The court held that the contract was made in London, and not in Norwich, and therefore that the whole cause of action did not accrue within

⁸⁵ *Walker v. Bank*, 9 N. Y. 582.

⁸⁶ N. I. L. § 138. *Leslie v. Hastings*, 1 Moody & R. 119. Defendant gave A a stamp with his acceptance in blank, authorizing A to draw for a certain sum at a specified date, and A drew the bill on the stamp accordingly. Held, in an action by the indorsee against the acceptor, that the acceptance was valid. *Hopps v. Savage*, 69 Md. 513, 16 Atl. 133, 1 L. R. A. 648.

⁸⁷ But in jurisdictions where the N. I. L. is in force, acceptance is complete without delivery if it be communicated. N. I. L. § 191.

⁸⁸ 2 Ames, Bills & N. p. 791.

⁸⁹ 21 Law J. Q. B. 280. See, also, *Roff v. Miller*, 19 Law J. C. P. 278; *Thornton v. Dick*, 4 Esp. 270. In *Bentinck v. Dorrien*, 6 East, 199, a bill on the defendants was left by the plaintiff, who was indorsee. The defendants accepted, but on the next day canceled their acceptance, whereupon plaintiff protested for nonacceptance. It was held that, while such acceptance might be valid as to a third party, the plaintiff had, by protesting, precluded himself from claiming an acceptance.

the county, and hence that the court had not jurisdiction. Lord Coleridge, referring to the argument that an acceptance was like an indorsement, distinguished the acceptance from an indorsement, and said: "One purpose of an indorsement is to pass the property in the bill, and that purpose is not effected until actual or constructive delivery. But the acceptor has no property in the bill before or after acceptance. He must be supposed to receive the drawer's paper and on it write his promise without in any way altering the property in the bill. He may, indeed, before any communication to the drawer of the act done, revoke it, but his promise, unless so revoked, is complete, and takes effect from the time when it is made." The reasoning of this case cannot be reconciled with the earlier case of *Cox v. Troy*,⁴⁰ where the indorsees of a bill left it with the drawee for acceptance, and he after writing an acceptance thereon redelivered it with the acceptance crossed out, and it was held that he was not liable as acceptor, on the ground that an acceptor was at liberty to revoke an acceptance before redelivery of the bill. The reason advanced in support of this view was the practical one that no person could be prejudiced by permitting the drawee to withdraw his acceptance before redelivery, and the law is generally laid down in accordance with *Cox v. Troy*.⁴¹

⁴⁰ 5 Barn. & Ald. 474.

⁴¹ *Dunavan v. Flynn*, 118 Mass. 537; *Freund v. Importers' & Traders' Nat. Bank*, 3 Hun (N. Y.) 689; *Rand. Com. Paper*, § 637; *Daniel, Neg. Inst.* § 490; *First Nat. Bank v. First Nat. Bank*, 127 Tenn. 205, 154 S. W. 965 (N. I. L.). Under N. I. L. § 191, however, acceptance is complete without delivery, provided it be communicated. An acceptor may after delivery rescind his acceptance for fraud, if the paper has not passed into the hands of a holder in due course. *Johnson County Sav. Bank v. Gregg*, 51 Colo. 358, 117 Pac. 1003 (N. I. L.).

FORMS AND VARIETIES OF ACCEPTANCE

48. An acceptance, if in writing, is constituted by any words from which an intention to accept can be gathered.
49. An acceptance, if verbal, is constituted by any words which evidence such intention clearly and unequivocally, if they be addressed to the drawer or holder, and he waive his right to a written acceptance. An acceptance may also be implied from conduct evidencing such intention.

As has been said, the acceptance is the assent of the drawee to the request of the drawer. The question, then, is, what, under the law merchant, will be deemed an evidence of such assent.⁴² There are three general classes based upon the divisions we have given above: Acceptances in writing, acceptances by parol, and acceptances implied from conduct.

If in writing, the courts, according to Judge Cowen,⁴³ go to the length of saying that any form of words which do not in themselves negative the request of the bill shall be

⁴² Where a check drawn on one bank by another, payable to a third person, was paid by the drawee bank upon a forged indorsement, the court held that the payment did not constitute an acceptance, citing First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 229, and quoting from that case as follows: The argument that such payment constituted an acceptance "proceeds on the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all its duty, and there would be no claim upon it. The bank supposed that it had paid the check, but this was an error. In law the check remains unpaid." Sims v. American Nat. Bank of Ft. Smith, 98 Ark. 1, 135 S. W. 356.

⁴³ Spear v. Pratt, 2 Hill (N. Y.) 582, 38 Am. Dec. 600. Referring to the laxity of the courts in construing acceptances, Willes, J., said, in Sprott v. Matthews, 1 Term R. 185: "The court has not of late been very nice with regard to what shall be construed to be an acceptance; for though formerly it was held necessary that an acceptance should be in writing, yet of late years a parol acceptance has been deemed sufficient; and, indeed, at present almost anything amounts to an acceptance."

treated as a valid acceptance of it.⁴⁴ Under the common law, neither the word "Accepted" nor the signature of the acceptor is necessary. The unsigned words "Seen,"⁴⁵ "Presented,"⁴⁶ "Honored,"⁴⁷ or merely the name of the drawee,⁴⁸ or "I will pay this bill,"⁴⁹ are sufficient acceptances. In many jurisdictions written and signed acceptances are required,⁵⁰ meaning, according to the interpreta-

⁴⁴ Where a bill was drawn on the defendant, and he wrote across it: "Accepted. Payable at Messrs. Stevens & Co."—but failed to sign, it was held to amount to an acceptance. The court, in summing up, said that it was of opinion that the writing might be valid in law, though unsigned, but that whether it was intended so to operate in its unfinished condition was a question for the jury. *Dufaur v. Oxenden*, 1 Moody & R. 90. In an action of assumpsit by the indorsee against the acceptor, it was proved that the defendant had given a stamp, with his acceptance in blank to the drawer, and authorized him to draw at a certain date for a specific amount. It was held that there was an actual acceptance in writing, with express authority to fill in the bill in a particular manner. *Leslie v. Hastings*, 1 Moody & R. 119. In an action by the indorsee against the acceptor it appeared that the drawee signed his name after the address. Across the bill was stamped the word "Accepted," and after a blank line for signature the words "Sign here" appeared. It was held that there was an actual acceptance in writing, although there was no signature over the blank line for that purpose. *First Nat. Bank of Iowa City v. Trognitz*, 14 Cal. App. 176, 111 Pac. 402.

⁴⁵ *Barnet v. Smith*, 10 Fost. (30 N. H.) 256, 64 Am. Dec. 290.

⁴⁶ *Pars. Bills & N.* 282.

⁴⁷ *Anson, Cont.* 401.

⁴⁸ *Spear v. Pratt*, 2 Hill (N. Y.) 582, 38 Am. Dec. 600.

⁴⁹ *Ward v. Allen*, 2 Metc. (Mass.) 53, 35 Am. Dec. 387.

⁵⁰ The statutes differ in their provisions, some requiring the acceptance to be in writing, and others that it be in writing, and signed by the acceptor. The American statutes are collected in Rand. Com. Paper, § 605. The student should consult the statutes of his own state. The Negotiable Instruments Law goes far to reform and render uniform the unsatisfactory condition of the American law. It provides that "the acceptance must be in writing, and signed by the drawee" (§ 132); that the holder "may require that the acceptance be written on the bill" (§ 133); and that, "where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown, and who, on the faith thereof, receives the bill for value" (§ 134). The Negotiable Instruments Law is less radical than the English Bills of Exchange Act (45 & 46 Vict. c. 61), which (§ 17) provides that the ac-

tion of numerous cases, that an acceptance is sufficient if it be the name of the acceptor alone, which complies with the regulation that the acceptance shall be in writing and be signed.⁵¹ Under the Negotiable Instruments Law every

ceptance must be written on the bill, and be signed by the drawee. This was a re-enactment of 19 & 20 Vict. c. 97, § 6 (1856) and of 1 & 2 Geo. IV, c. 78, § 2 (1821), which, however, applied only to inland bills. The English act thus gives complete recognition to the principle that the obligation of the acceptor, like that of all other parties to negotiable paper, should appear on the bill itself. 2 Ames Cas. Bills & N. 787. In Washington, a complaint under the N. I. L. failing to allege a written acceptance is demurrable as failing to state a cause of action. Nelson v. Nelson Bennett Co., 31 Wash. 116, 71 Pac. 749 (N. I. L.); Wadhams v. Portland, V. & Y. Ry. Co., 37 Wash. 86, 79 Pac. 597 (N. I. L.), following the Nelson Case. The question was not raised in Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064 (N. I. L.). In Alabama, a contrary conclusion has been reached. Faircloth-Byrd Mercantile Co. v. Adkinson, 167 Ala. 344, 52 South. 419 (N. I. L.). In Baltimore & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837 (N. I. L.), there was no allegation of a written acceptance, but the question was not raised, the alleged order being insufficient. In Dugane v. Hvezda Pokroku No. 4 (Iowa) 119 N. W. 141 (N. I. L.), Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182 (N. I. L.), and Izzo v. Lundington, 79 N. Y. Supp. 744, 79 App. Div. 272, affirmed 178 N. Y. 621, 70 N. E. 1100 (N. I. L.), it does not appear whether there was a written acceptance alleged in the complaint or not, but in each, the plaintiff failed through his inability to prove one, the necessity of such an allegation not being discussed. The Nelson Bennett and Wadhams Cases, supra, settle the rule for Washington, but Alabama is the only other state which has decided the point directly, reaching the opposite conclusion in the Faircloth Case. The Baltimore & O. Ry. Co., Dugane, Van Buskirk, and Izzo Cases, while they decide nothing on the point, seem to indicate that a complaint alleging a due acceptance, but not alleging it to be in writing, is not fatally defective. See, also, Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515, where the court held that, when the answer does not show affirmatively that the acceptance was by parol, a presumption arises that it was in writing.

⁵¹ The drawee of a bill of exchange wrote his name across the face of the bill, without words of acceptance. This was held to be such an acceptance as to bind him, even though the statutory requirements were that the acceptance should be in writing, and signed. Spear v. Pratt, 2 Hill (N. Y.) 582, 38 Am. Dec. 600. In Hughes Bros. v. Rawhide Gold Min. Co., 16 Cal. App. 293, 116 Pac. 969, the statutory requirement was that the acceptance must be in writ-

holder of a bill, presenting the same for acceptance, may require the acceptance to be written on the bill. A refusal to comply shall be deemed a refusal to accept, and the bill may be treated as dishonored.⁵²

In jurisdictions where acceptances are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances are permitted.⁵³ A parol acceptance is any form of words used by the drawee which by reasonable intendment can be made to signify that he honors the bill. There are some limitations to this rule. These words are to be addressed to the drawer or holder. They must be assented to by the holder.⁵⁴ They must relate to an existing bill, for, if they pertain to a future bill, they will not be deemed an acceptance.⁵⁵ They must be unequivocal, for, if they are equivocal, they will not be deemed an acceptance. In such expressions as "Your bill shall have attention," "I will pay the bill, but I cannot now," "I will give you a bill at three months,"⁵⁶ there is no distinct, definite promise or agreement to pay the bill.

ing and "may be made" by the acceptor writing his name across the face of the bill, with or without other words. It was held that the phrase "may be made" indicates that the section is permissive only, and that any other written acceptance clearly disclosing the drawee's intention to accept will constitute an acceptance.

⁵² N. I. L. § 133.

⁵³ Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245; Stockwell v. Bramble, 3 Ind. 428; Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368; Sturges v. Fourth Nat. Bank of Chicago, 75 Ill. 595; St. Louis Nat. Stockyards v. O'Reilly, 85 Ill. 546; Golsen v. Golsen, 127 Ill. App. 84; Bank of Laddonia v. Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648 (N. I. L.); Lumley v. Palmer, 2 Strange, 1000; Sproat v. Matthews, 1 Term R. 182; Arnold v. Sprague, 34 Vt. 402; Miller v. Neihaus, 51 Ind. 401; Pierce v. Kittredge, 115 Mass. 374.

⁵⁴ Story, Bills, §§ 242-247; Edw. Bills & N. §§ 416, 417; Bayley, Bills & N. c. 6, § 109; Johnson v. Collings, 1 East, 98.

⁵⁵ In Johnson v. Collings, the bill on which the action was brought was drawn by R. on defendant, the latter saying that if R. would draw such bill he would pay it on maturity. This bill was subsequently indorsed to plaintiffs. It was held that such mere promise to pay a non-existing bill did not operate as an acceptance. 1 East, 98.

⁵⁶ Reynolds v. Peto, 11 Exch. 418.

They were consequently deemed by the court too uncertain to be treated as acceptances. The point to be determined is whether, by a reasonable construction, the words used will show that the acceptor recognized an immediate obligation on the part of the drawee upon him, assented to it, and declared himself bound to the payment of it as evidenced by the bill.⁵⁷ Keeping in mind the expressions we have quoted, contrast them with such expressions as those used by the drawee in a case where a foreign bill had been protested for nonacceptance, and the drawee said, "If the bill comes back, I will pay it,"⁵⁸ or, in another case, where the drawee said, "Leave your bill with me, and I will accept,"⁵⁹ both of which expressions were held to be sufficient acceptances. In these last expressions there was a distinct promise to honor the bill. It is probably the case that, when verbal acceptances are permitted, they will at the present day be construed with extreme strictness. It is undoubtedly the common law that they are allowable.⁶⁰ But it is also equally true that they are not in accord with

⁵⁷ In *Powell v. Jones*, the bill was given to the defendant for acceptance by the clerk of the plaintiff. On calling for it afterwards the defendant said: "There is your bill. It is all right." It was held—though by what was certainly a somewhat strained application of the rule—that these words did not amount to an acceptance, as they did not evidence the defendant's intention to bind himself to pay at all events. 1 *Esp.* 17. The words, "If you will send it to the counting house again, I will give directions for its being accepted," were held to constitute only a conditional promise, and not to operate as an acceptance until the bill was actually sent back. *Anderson v. Hick*, 3 *Camp.* 179. Where the defendants agreed to accept as soon as the underwriters had settled a certain loss, it was held that such conditional acceptance could not be declared on as an absolute acceptance, when such contingency had actually happened. *Langston v. Corney*, 4 *Camp.* 176.

⁵⁸ *Cox v. Coleman*, *Chit. Bills*, 274.

⁵⁹ 1 *Chit. Bills*, p. 12.

⁶⁰ In *Spaulding v. Andrews*, it was shown that, shortly after a bill was drawn, the payee, who was the holder, presented it to the drawee, and received verbal assurance that it would be paid on maturity. It was held there was an acceptance good as to a third party who obtained the bill after such parol acceptance, though he did not know of the acceptance, and that it made no difference as to when a parol acceptance was made, if after the bill was drawn. 48 *Pa.* 411.

the true theory of negotiability. A bill of exchange should have all its indicia upon its face. And this rule, with every other that contravenes it, complicates business operations, and clogs the circulation of an instrument as a medium of payment.

SAME—IMPLIED ACCEPTANCE

50. AN IMPLIED ACCEPTANCE—Is any act which clearly indicates an intention to comply with the request of the drawer, or any conduct of the drawee from which the holder is justified in drawing the conclusion that the drawee intended to accept the bill, and intended to be so understood.⁶¹

An implied acceptance is equally open to the objections we have made to the verbal acceptance, though the doctrine of constructive or implied acceptance is in itself consistent with justice. Its limits are not exactly defined. It may arise where the bill is detained for a long time, contrary to the usage of the parties, or withheld upon the understanding that the drawee is to accept.⁶² Where, however, the detention is not contrary to the usual dealings between the parties, or is due to the fact that the holder failed to call for it, the doctrine does not apply.⁶³ And in general it may be said that mere retention cannot amount to acceptance.⁶⁴ This follows from the fact that, where there

⁶¹ Daniel, *Neg. Inst.* § 499; 1 *Pars. Notes & B.* 287. See *First Nat. Bank of Cottage Grove v. Bank of Cottage Grove*, 59 Or. 388, 117 Pac. 293 (N. I. L.).

⁶² *Hall v. Steel*, 68 Ill. 281; *Hough v. Loring*, 24 Pick. (Mass.) 254; *Nason v. Barff*, 2 Barn. & Ald. 26; *Koch v. Howell*, 6 Watts & S. (Pa.) 350.

⁶³ *Overman v. Hoboken City Bank*, 30 N. J. Law, 61; *Hentz v. National City Bank*, 159 App. Div. 743, 144 N. Y. Supp. 979 (N. I. L.). *Wisner v. First Nat. Bank of Gallitzin*, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266 (N. I. L.), is contra. But see note 68.

⁶⁴ *Jeune v. Ward*, 1 Barn. & Ald. 653; *Dunavan v. Flynn*, 118 Mass. 537, per Gray, C. J.; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; *Colorado Nat. Bank of Denver v. Boettcher*, 5 Colo. 190, 40 Am. Rep. 142; *Overman v. Hoboken City Bank*,

is no usage of the parties to the contrary, it is the duty of the holder to call or send for the bill, and hence no implication of acceptance can arise from the failure of the drawee to return. A fortiori, a refusal to return can give rise to no such implication, since the refusal plainly negatives an intention to accept. The same remark applies to the destruction of the bill, which, like refusal to return on demand, amounts to a conversion, but cannot, on any sound principle, imply an acceptance.⁶⁵ In some states, however, it is provided by statute that if the drawee destroys the bill, or refuses within 24 hours after delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted, he will be deemed to have accepted.⁶⁶ Such is the provision of the Negotiable Instruments Law.⁶⁷ Under earlier statutes to this effect it has been held that the statutes did not cover the case of a mere failure to return, but referred to something of a tortious character, implying a conversion of the bill.⁶⁸

31 N. J. Law, 564; St. Louis Southwestern Ry. Co. v. James, 78 Ark. 490, 95 S. W. 804, 8 Ann. Cas. 611.

⁶⁵ Jeune v. Ward, 1 Barn. & Ald. 653. Here the drawee, after refusing to accept, destroyed the bill, and it was said, Lord Ellenborough dissenting, that this did not amount to an acceptance. Bayley, J., said: "Where a bill is, in the usual course of business, left for acceptance, it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. * * * I forbear to say, at present, what would be my judgment on the effect of a destruction of the instrument, by the party with whom it was left for acceptance, within the reasonable time during which the other party might expect an acceptance of the bill. If a party says he has destroyed the bill, and that he will not accept it, such destruction might probably subject him to an action of trover for the bill; but I cannot think it would amount to an acceptance of it. For, what is an acceptance? It is an engagement of the one party acceding to the proposition of the other; and it would be very strange, indeed, if a refusal on his part could in law be deemed an acceding to the proposition."

⁶⁶ The statutes are collected in Rand. Com. Paper, § 620.

⁶⁷ § 137.

⁶⁸ Matteson v. Moulton, 11 Hun (N. Y.) 268, affirmed 79 N. Y. 627; St. Louis Southwestern Ry. Co. v. James, 78 Ark. 490, 95 S. W. 804, 8 Ann. Cas. 611; Dickinson v. Marsh, 57 Mo. App. 566. In the last case this construction was adopted by the court on the ground that

SAME—ACCEPTANCE ON SEPARATE PAPER

51. If the bill is in existence, for the convenience of business the acceptance may be on a separate paper, but the promise must be clear and unequivocal.⁶⁹
52. If the bill is not in existence, for the convenience of business the acceptance may be on a separate paper. Its elements are:
 - (a) That the contemplated drawee shall describe the bill to be drawn, and promise to accept it.
 - (b) That the bill shall be drawn in a reasonable time after such promise is written.
 - (c) That the holder shall take the bill upon the credit of the promise.

Acceptances on a separate paper are of two classes: Those referring to a bill in existence at the time of the ac-

any other would render nugatory the section of a statute providing that: "No person within this state shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent." N. I. L. § 137, has received the same interpretation. WESTBERG v. CHICAGO LUMBER & COAL CO., 117 Wis. 589, 94 N. W. 572 (N. I. L.), Moore Cases Bills and Notes, 95, semble. Contra: State Bank v. Weiss, 46 Misc. Rep. 93, 91 N. Y. Supp. 276 (N. I. L.); Wisner v. First Nat. Bank of Gallitzin, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266 (N. I. L.); Provident Securities & Banking Co. of Boston v. First Nat. Bank of Gallitzin, 37 Pa. Super. Ct. 17 (N. I. L.). The last three cases are erroneous. See Brannan, Anno. N. I. L. (2d Ed.) pp. 135, 136. The effect of Wisner v. Bank and Provident Co. v. Bank has been corrected by statute in Pennsylvania, Act 169, Apr. 27, 1909.

⁶⁹ N. I. L. §§ 132-134. State Bank of Beaver County v. Bradstreet, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. (N. S.) 747 (N. I. L.), telegram; Eakin v. Citizens' State Bank, 67 Kan. 338, 72 Pac. 874, telegram; Lehnhard v. Sidway, 160 Mo. App. 83, 141 S. W. 430 (N. I. L.), letter, semble. Oil Well Supply Co. v. Mac Murphey, 119 Minn. 500, 138 N. W. 784; First Nat. Bank v. First Nat. Bank (D. C. Ohio) 210 Fed. 543 (N. I. L.). But the extrinsic writing must import a promise to pay the bill. First Nat. Bank of Atchison v. Commercial Sav. Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281 (N. I. L.); Plaza Farmers' Union Warehouse & Elevator Co. (Wash.) 188 Pac. 651 (N. I. L.).

ceptance; and those referring to a bill yet to be drawn, and promising to accept it when drawn. Theoretically, as forcibly pointed out by Professor Ames, these acceptances are in defiance of the general principles of the law merchant. By this creation of the law, one indorser who does not see the outside acceptance has no remedy against the acceptor, while his immediate indorsee, who sees and discounts the bill on the faith of the promise, has a remedy his prior indorser had not.⁷⁰ As a business expedient, the reasons in support of promises to accept stated by Chief Justice Marshall apply alike to both classes.⁷¹ "The great motive," he said, "for construing a promise to accept as an acceptance, is that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and, if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it." His decision closes with the declaration "that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise." The reasons for this rule are twofold. One is the practical one that, without it, much embarrassment would be thrown in the way of commercial transactions. A knowledge that a draft will be accepted is often of the utmost importance to the drawer in assisting the negotiation of bills of exchange; and, if the promisor was not bound by what he had written, extensive frauds might be perpetrated. The view which the courts take is that the rule prevents these frauds, and accommodates the mercantile transactions of the country.⁷² The other reason was based in its

⁷⁰ 2 Ames Bills & N. p. 788.

⁷¹ COOLIDGE v. PAYSON, 2 Wheat. 66, 4 L. Ed. 185, Moore Cases Bills and Notes, 100. See, also, Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515.

⁷² Greele v. Parker, 5 Wend. (N. Y.) 414; Russell v. Wiggin, 2

origin upon the great authority of Lord Mansfield in England,⁷³ supported in the United States by the opinion of Chief Justice Kent,⁷⁴ that if the collateral acceptance be shown to a third person, so as to excite credit, and to induce him to advance money on the bill, such third person ought not to suffer by the confidence excited. And these two reasons have generally prevailed over the strongest objection and severest criticism of the opponents of the theory, so that it is at present established law. It is the credit which such acceptance or engagement to accept has given to the bill which gives to it its binding operation.⁷⁵

There is a distinction drawn between acceptances on separate paper or promises to accept existing bills and promises to accept bills to be drawn within a reasonable time in the future. It may be urged that this is a distinction without a substantial difference, but traces of it are found everywhere. The enactments of the Negotiable Instruments Law are declarative of the American law. The statute enacts:⁷⁶ "Sec. 134. Where an acceptance is written on

Story, 213, Fed. Cas. No. 12,165, per Story, J.; *Parrish v. Taggart-Delph Lumber Co.*, 11 Ga. App. 772, 76 S. E. 153.

⁷³ *Pillans v. Van Mierop*, 8 Burrows, 1663, afterwards repudiated in *Johnson v. Collings*, 1 East, 98, and *Bank of Ireland v. Archer*, 11 Mees. & W. 383.

⁷⁴ *McEvers v. Mason*, 10 Johns. (N. Y.) 207.

⁷⁵ Thompson, C. J., in *Goodrich v. Gordon*, 15 Johns. (N. Y.) 6; *Cassel v. Dows*, 1 Blatchf. 335, Fed. Cas. No. 2,502; President, etc., of Worcester Bank v. Wells, 8 Metc. (Mass.) 107; *Steman v. Harrison*, 42 Pa. 57, 82 Am. Dec. 491; *Rulz v. Renauld*, 100 N. Y. 256, 3 N. E. 182; *Murdock v. Mills*, 11 Metc. (Mass.) 5; *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Parker v. Greele*, 2 Wend. (N. Y.) 545; *Parrish v. Taggart-Delph Lumber Co.*, 11 Ga. App. 772, 76 S. E. 153. See, also, *Bank of Morganton v. Hay*, 143 N. C. 326, 55 S. E. 811 (N. I. L.). This is very common as a statutory provision in the laws of various states. An agreement by telegram has been held sufficient acceptance. *North Atchison Bank v. Garretson*, 2 C. C. A. 145, 51 Fed. 168, affirming *Garretson v. North Atchison Bank* (C. C.) 47 Fed. 867, and *Id.* (C. C.) 39 Fed. 163, 7 L. R. A. 428; *In re Armstrong* (C. C.) 41 Fed. 381. See note 69, supra.

⁷⁶ See Appendix.

a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown, and who, on the faith thereof, receives the bill for value. Sec. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." This distinction lies rather in words than in principle, for throughout both classes run these three principles: (1) In order to make this extrinsic promise an acceptance, credit must be given to it; (2) like every other promise or contract, its subject-matter must be definite or reasonably so; and (3) the promise must not be a nudum pactum. It must be upon a consideration, or, to express it as it commonly occurs in business transactions, the holder or person claiming the benefit of the promise must have discounted the bill upon the promise. The actual acceptance and the promise to accept differ mainly in the remedies administered upon them. With the actual acceptance there is but the remedy against the acceptor on the bill. With the promise to accept, if there is a refusal to give acceptance, the promisor is sued for breach of ordinary contract for whatever damage the holder of the bill has actually suffered, limited by the amount of the bill, with interest and costs.

These principles exclude from the operation of the rule cases where the indorsee has taken the bill in entire ignorance of the promise, or where the promise is made to some person, not the drawer of the bill, and made with no intention of its being shown as a means of exciting credit. In such cases the promisor is exempted. It is true that some cases draw a distinction in this respect between existing and non-existing bills, and hold that an acceptance of an existing bill, though on a separate paper, is equivalent in effect to an acceptance written upon the bill, and accrues to the benefit of the holder, whether or not he took the bill on the faith of such acceptance."⁷⁷ Such was the rule in

⁷⁷ *Read v. Marsh*, 5 B. Mon. (Ky.) 8, 41 Am. Dec. 253; *Mason v. Dousay*, 85 Ill. 424, 85 Am. Dec. 368; *Stockwell v. Bramble*, 8 Ind. 428. See *Spaulding v. Andrews*, 48 Pa. 411. Mr. Daniel points out

England before enactment of the statute requiring the acceptance to be written upon the bill itself.⁷⁸ But it is believed that the prevailing rule in the United States places acceptances of existing bills and promises to accept non-existing bills on the same footing in this respect, and requires the bill to be taken on the faith of the acceptance.⁷⁹

There remains but one more question to be answered, and that is, how definitely must the letter describe the draft to be binding in law as an acceptance of it. The letter need not be an agreement in terms to honor the draft. It may be read in the light of the surrounding circumstances, which may be used by the court to aid in ascertaining its purpose, and in applying and interpreting its language. The absence of technical promissory words is of no practical moment where the language employed is such as to import a promise to pay.⁸⁰ It need not contain a particular

(Neg. Inst. § 552) that the decisions on this point are in a condition of inextricable confusion, a result which was perhaps inevitable, the door having once been opened to recognizing the anomaly of extrinsic acceptances.

⁷⁸ *Wynne v. Raikes*, 5 East, 514; *Billing v. Devaux*, 3 Man. & G. 565; *Grant v. Hunt*, 1 C. B. 44.

⁷⁹ *Exchange Bank of St. Louis v. Rice*, 98 Mass. 298; *Overman v. Hoboken City Bank*, 30 N. J. Law, 61; *Lugrue v. Woodruff*, 29 Ga. 648. In *Exchange Bank of St. Louis v. Rice*, *supra*, Hill drew a bill to order of Pitman & Co. "against 12 bales of cotton." This being indorsed to plaintiffs, they presented it for acceptance, which was refused. In a letter to Hill defendant drawee explained that this was because no bill of lading had been sent, but that when the bill of lading was received they would accept the draft. Plaintiffs, having procured this letter and a duplicate bill of lading, again presented the bill, and protested it for non-acceptance, and subsequently for non-payment. It was held that the letter, having been written after plaintiffs took the bill of exchange, and not being addressed to them, did not make defendants liable to them as acceptors. Gray, J., said: "The American rule has the advantage of being uniform in its application to all promises to accept a particular bill, not made to the holder or written on the very bill, whether made before or after it is drawn; and of restricting within the narrowest limits the anomalous doctrine of liability to an action upon negotiable paper by reason of anything not appearing on the face of the paper itself."

⁸⁰ *Barney v. Worthington*, 37 N. Y. 112; *Bank of Michigan v. Ely*, 17 Wend. (N. Y.) 508, 512; *Ulster County Bank v. McFarlan*, 5 Hill

description or identification of the bill to be drawn. It is enough if it can be shown that the bill was drawn in pursuance of the authority to that effect. And it is safe to say from an examination of the authorities that in general all that is wanted is a general power to draw and a reasonable intendment; by this last is meant a statement of facts from which a man of ordinary prudence would infer that the power related to the bill which is offered for discount upon the supposed acceptance. If this appears, it is sufficient.

PAROL ACCEPTANCE OF A BILL

53. In the absence of statute to the contrary, an unequivocal parol promise to accept a specific existing bill is binding. But a promise to accept a future bill, even though the bill be taken by the holder upon the faith and credit of such promise, is not binding as an acceptance.

It is proper to say in the beginning that the doctrine of parol acceptances should be received with extreme caution. It is contrary to the theory of negotiability, which requires the obligation of all the parties to appear on the instrument itself, and to the general policy of law because of the vague and often uncertain evidence by which the acceptance itself is proved. But it is undoubtedly the law in jurisdictions where the Negotiable Instruments Law has not been adopted that oral acceptances of existing bills⁸¹ are valid and

(N. Y.) 432; *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161; *Naglee v. Lyman*, 14 Cal. 451; *Nelson v. First Nat. Bank of Chicago*, 48 Ill. 39, 95 Am. Dec. 510; *Nevada Bank v. Luce*, 139 Mass. 488, 1 N. E. 926; *Elliott v. First State Bank (Tex.)* 152 S. W. 808.

⁸¹ *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. Ed. 245; *JONES v. COUNCIL BLUFFS BRANCH OF STATE BANK OF IOWA*, 34 Ill. 313, 85 Am. Dec. 306, *Moore Cases Bills and Notes*, 105; *Sturges v. Fourth Nat. Bank of Chicago*, 75 Ill. 595; *Dull v. Bricker*, 76 Pa. 255; *Nelson v. First Nat. Bank of Chicago*, 48 Ill. 37, 95 Am. Dec. 510; *Elliott v. Miller*, 8 Mich. 132; *Bank of Laddonia v. Bright-Coy Commission Co.*, 139 Mo. App. 110, 120 S. W. 648 (N. I. L.). There is no doubt under the N. I. L. that an oral acceptance is invalid. See-

binding acceptances. The reasons given for this rule are much the same as those given for separate acceptances in writing. A verbal promise is treated as an acceptance because sound principles of morality require that one who promises another, although by parol, to accept a particular bill of exchange; and thereby induces him to advance his money upon such bill in reliance upon such promise, should be held to make good his promise. The party advances money upon an original promise upon a valuable consideration, and the promisor is bound to carry out his undertaking. Whether it is held to be an acceptance, or whether he is subject to damages for a breach of his promise to accept, or whether he is held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest.⁸² It would seem that this reason would apply alike to existing bills and to non-existing bills, yet the cases make a distinction. A verbal promise to pay a non-existing bill, even with the qualification that the bill is subsequently taken on the faith of it, does not amount to an acceptance, because in order to constitute an acceptance there ought to have been a bill in existence to be accept-

tle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064 (N. I. L.); Izzo v. Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744, affirmed 178 N. Y. 621, 70 N. E. 1100 (N. I. L.); Faircloth-Byrd Mercantile Co. v. Adkinson, 167 Ala. 344, 52 South. 419 (N. I. L.); Dugane v. Hvezda Pokroku No. 4 (Iowa) 119 N. W. 141 (N. I. L.); Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 88 Pac. 778, 117 Am. St. Rep. 182 (N. I. L.); Lawson v. Layton & Layton (Del.) 86 Atl. 105 (N. I. L.); Rambo v. First State Bank, 88 Kan. 257, 128 Pac. 182 (N. I. L.); Sheets v. Coast Coal Co., 74 Wash. 327, 133 Pac. 433 (N. I. L.). The same result was reached under similar statutes before the N. I. L. was adopted. Dickinson v. Marsh, 57 Mo. App. 566. The same rule applies to checks under § 185 of the act. Baltimore & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837 (N. I. L.).

⁸² Townsley v. Sumrall, 2 Pet. 170, 7 L. Ed. 386; Boyce v. Edwards, 4 Pet. 111, 7 L. Ed. 799; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245; Scott v. Plirkington, 15 Abb. Prac. (N. Y.) 280; Bissell v. Lewis, 4 Mich. 450; Williams v. Winans, 14 N. J. Law, 339; Bank of Ireland v. Archer, 11 Mees. & W. 383. In this case, a party being requested to accept a bill to be subsequently made, said: "Send it

ed.⁸³ And to hold that the same act would be an acceptance or not, according to the varying relations of the subsequent holders of the bill, would introduce a strange anomaly and confusion into the relation of the parties to the bill, the drawee being an acceptor as to some and not as to the other indorsees. There is one further objection to be noted to parol acceptances which is found in the cases. It is that a parol acceptance is obnoxious to that provision of the statute of frauds which provides that all promises to answer for the debt of another shall be in writing and signed by the promisor. It is maintained that an acceptance is such a promise, and particularly in the case when it is an accommodation acceptance, because then the acceptor merely guarantees some one else's debt.⁸⁴ But despite the respectable authority supporting this view, its reasons do not seem sound. In issuing a bill the drawer says to the drawee, "Pay so much money to the payee, and I will repay it to you," and the drawee in his acceptance thereupon promises to pay the money called for in the bill to the payee. The promises are thus original and independent. And if money is paid on the faith of it, there is an original consideration moving between the parties to the contract. Damage to the promisee constitutes as good a consideration

for acceptance as usual, remitting proceeds at the same time, and I will advise my partner." In an action on the bill it was held that a parol promise to accept a bill of exchange afterwards drawn, on the faith of which promise the bill is discounted, does not amount to an acceptance. *Johnson v. Collings*, 1 East, 98; *Kennedy v. Geddes*, 8 Port. (Ala.) 263, 33 Am. Dec. 289; *Mercantile Bank v. Cox*, 38 Me. 500; *Plummer v. Lyman*, 49 Me. 229; *Wilson v. Clements*, 3 Mass. 1; *Edson v. Fuller*, 22 N. H. 183, 188; *Wakefield v. Greenhood*, 29 Cal. 600; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Taylor v. Drake*, 4 Strob. (S. C.) 431, 53 Am. Dec. 680.

⁸³ *Bank of Ireland v. Archer*, 11 Mees. & W. 383, note 82; *Johnson v. Collings*, 1 East, 98.

⁸⁴ A parol acceptance for value is not affected by the section of the statute of frauds referred to. *Ames Cas. on Suretyship*, p. 107, note 6, par. 3. A parol acceptance for accommodation has, however, been held to be within the statute of frauds. *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 76 N. E. 52, 109 Am. St. Rep. 314, and cases cited in the last paragraph of this opinion. Contra: *JARVIS v. WILSON*, 46 Conn. 90, 33 Am. Rep. 18, *Moore Cases Bills and Notes*, 5.

as benefit to the promisor. And where there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promisee, this promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. The object of the promise is to induce the party to take the bill upon the credit of the promisee, and, if he so take it, it binds the promisor.

ACCEPTANCE FOR HONOR OR SUPRA PROTEST

54. DEFINITION—An acceptance supra protest is an undertaking by a stranger to the bill, after protest, for the benefit of all parties subsequent to him for whose honor it is made, and conditioned to pay the bill when it becomes due if the original drawee does not.

54a. An acceptance supra protest may be made—

- (a) After dishonor by non-acceptance.
- (b) After protest for better security after acceptance.

The acceptance for honor is an exception to the rule (supra, § 46) that no one but the drawee can be an acceptor. It is not commonly met with in this country, and therefore it is our purpose to outline without much discussion of the rules concerning it.

In its nature it is a sort of conditional acceptance, the contract being, as we shall hereafter see (see post, § 72), to pay if, upon further presentment of the bill to the drawee for payment at maturity, it is again dishonored and duly protested. The bill must in the first instance be presented to the drawee and protested, because the drawer and indorsers have a right to a presentment to and demand of the drawee and also a right to the full legal form of protest.⁸⁶ But protest once being made, any person not a party to the bill may accept it for the honor of any other party to it, or there may be successive acceptors to the bill

⁸⁶ Story, Bills, § 256.

for the honor of different parties to it,⁸⁶ or any one acceptor may accept for any or all parties to the bill. The method of making an acceptance for honor is for the party to appear before a notary public and declare that he accepts such protested bill in honor of the drawer or indorsers, as the case may be, and he then in some form of writing signifies such acceptance. Usual forms are "Accepts S. P.," or "Accepted for the honor of X." As soon as this form is complete, it is the duty of the acceptor for honor to notify the parties to the bill for whose honor he has accepted. Of course, no holder is bound to take the acceptance of such an acceptor, but having once accepted it he is bound by it and cannot sue such party until the maturity of the bill and its dishonor by the acceptor supra protest.⁸⁷

There is a species of acceptance for honor known as the protest for better security. According to Mr. Chitty,⁸⁸ "The custom of merchants is stated to be that if the drawee of a bill of exchange abscond before the day when the bill is due, the holder may protest it in order to have better security for its payment, and should give notice to the drawer and indorsers of the absconding of the drawee; and if the acceptor of a foreign bill become bankrupt before it is due, it seems the holder may also in such case protest for better security. The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers, and its principal use appears to be that by giving notice to the drawer and indorsers of the situation of the acceptor, or by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due."⁸⁹

⁸⁶ König v. Bayard, 1 Pet. 250, 7 L. Ed. 132.

⁸⁷ Williams v. Germaine, 7 Barn. & C. 468, 1 Man. & R. 394. For the provisions of the Negotiable Instruments Law concerning acceptance for honor, see §§ 161-170.

⁸⁸ Chit. Bills, 383.

⁸⁹ Daniel, Neg. Inst. § 530. See, also, *Ex parte Wackerbarth*, 5 Ves. 574.

TIME ALLOWED FOR ACCEPTANCE

55. The drawee is allowed a reasonable time, generally held to be 24 hours, within which to accept a bill of exchange.

After presentation the drawee is entitled to a reasonable time to decide whether or not he will accept, and this is generally held to be twenty-four hours.⁹⁰ It is said that this time may be shortened by the departure of the regular mail in the meantime, but this rule has not been followed in the United States.⁹¹ If, upon expiration of the time allowed, the drawee has not accepted, it is the duty of the holder to protest for non-acceptance.⁹² The Negotiable Instruments Law provides that the drawee shall be allowed twenty-four hours, but that acceptance, if given, dates from the day of presentation.⁹³ A bill may be accepted after acceptance has been refused, and after protest for non-acceptance.⁹⁴ It may also be accepted after maturity, or after dishonor, in which case the acceptor becomes liable to pay the holder on demand.⁹⁵

⁹⁰ *Bellasius v. Hester*, 1 Ld. Raym. 280; *Ingram v. Forster*, 2 J. P. Smith (Eng.) 243; *Connelly v. McKean*, 64 Pa. 113; *Case v. Burt*, 15 Mich. 82.

⁹¹ *Rand. Com. Paper*, § 595.

⁹² *Ingram v. Forster*, 2 J. P. Smith (Eng.) 243.

⁹³ § 136; *First Nat. Bank v. First Nat. Bank*, 127 Tenn. 205, 154 S.W. 965 (N. I. L.).

⁹⁴ *Stockwell v. Bramble*, 3 Ind. 428; *Rand. Com. Paper*, § 596. But the previous refusal discharges the other parties unless they assent or the bill was protested. 2 Ames Cas. Bills & N. 789; Daniel, Neg. Inst. § 491.

⁹⁵ *Rand. Com. Paper*, § 596. "A bill may be accepted * * * when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. N. I. L. § 138.

CHAPTER IV

INDORSEMENT

- 56. Definition.
- 57. Formal Requisites.
- 58-61. Blank and Special Indorsements.
- 62-64. Indorsement without Recourse, Conditional and Restrictive Indorsement.
- 65. Nature of Indorsement.
- 66. Requisites of Indorsement.
- 67-68a. Irregular Indorsements.

DEFINITION

56. **INDORSEMENT**—Is the writing of the name of the indorser on the instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both. It strictly applies only to negotiable instruments.

FORMAL REQUISITES

57. The formal requisites of an indorsement are:
- (a) Though usually on the back of the instrument, an indorsement is valid if on its face, but it must be somewhere upon it. When by reason of rapid circulation the instrument becomes filled with indorsements, the law merchant permits the holder to paste on a slip of paper for his own and subsequent indorsements. This is called an allonge.
 - (b) The usual form of indorsement is the signature of the indorser, with or without a direction to pay to the indorsee described, or to him or order. Any form of words with the signature from which the intent of the holder to incur the liability of an indorser may be gathered is a sufficient indorsement.

An indorsement is classed by itself as a distinct body of contract rights and liabilities. It has its origin in and is confined to negotiable instruments.¹ In the illustration in note 98, page 68, which we have so often referred to, B. pays A. £1,000, and A. gives the bill to him; D. pays B. £1,000, and B indorses the bill to him; and E. pays D. £1,000, and D. indorses the bill to him. In each instance B., D., and E. get what for their purposes is as good and better than £1,000 in gold. And, in turn, as B. or D. was paid the £1,000, and indorsed the bill, he assumed some liability. He did all he could to assure the indorsee, who paid the £1,000 to him, that he in turn would get his money. He said to the indorsee: "You give me £1,000 in gold, which cannot be transported because of its weight, or £1,000 in bank notes, which are inconvenient to carry because of their danger of being lost, and I will give you a claim payable to you alone, and which at New York or Charleston or Jamaica will be just as good to you as the £1,000 in gold or bank notes would have been. You may safely take this, because if C. does not accept or pay this, I, to whom you have paid the £1,000, will repay it to you."² "A payee (or subsequent holder)," says Professor Ames,³ "instead of holding a bill and collecting it at maturity, may wish to transfer his interest in it to another, in which case he indorses the bill, i. e. he writes and signs upon the back of the bill an order directing its payment to the desired transferee. The order is written with mercantile conciseness, e. g. 'Pay A. [Signed] X.'—the other terms being contained upon the face of the bill. The custom of merchants, however, has attached to this order of the indorser a liability similar to that which attaches to the order of the drawer. By an indorsement, therefore, a party not only passes his interest in the bill to another, but also pledges his credit for the honor of the bill. In other words, an indorsement is at once a transfer and a contract."

¹ Orrick v. Colston, 7 Grat. (Va.) 195; Bank of Marietta v. Pindall, 2 Rand. (Pa.) 475.

² Ingalls v. Lee, 9 Barb. (N. Y.) 647; Hill v. Lewis, 1 Salk. 132; Evans v. Gee, 11 Pet. 80, 9 L. Ed. 639.

³ 2 Ames Cas. Bills & N. p. 836.

The student must fully grasp this idea—that the indorsement is a contract, and a contract to which the law merchant and the common law have appended very peculiar conditions. It is something in a nature of a guaranty,⁴ something in the nature of a warranty, and to the liability under it the law has attached the very unusual conditions of presentment, demand, and notice of dishonor.⁵ It is, moreover, a mode of transfer of title. We may be pardoned in referring again to the illustrations under §§ 12 and 13. In these instances the drawer or maker contracted to pay "John Smith, or his order," meaning John Smith, or some person to whom John Smith especially directed the sums of money called for in the instruments should be paid. The only construction of this would be that John Smith must direct payment. He must direct it in writing. Until he does so direct it, and evidences this direction by writing it on the instrument, the title to the instrument, and the right to the sum of money called for by its terms, remain in him. But, when he does direct it by indorsing it, that (under the law merchant) shows to all the world that John Smith has signified his wish that it should be paid to some other person.

In the place and form of the words of the indorsement, the law looks rather to the intention of the parties than to a strict compliance with its usual forms. According to the usual method, an indorsement, as its name implies, is written on the back of the instrument. And indeed this usual method and this original meaning carry with them such force that it has been held that where one alleges that a note was "indorsed" he may be presumed to mean that there was writing of some kind on its back.⁶ But neither this customary method nor this original meaning are allowed by the law to prevail over the purpose and intention of the parties. And an indorsement elsewhere upon the

⁴ *Oakley v. Boorman*, 21 Wend. (N. Y.) 588; *Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; *Id.*, *Johns. Cas. Bills & N. 118*; *De Pauw v. Bank of Salem*, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46; *Id.*, *Johns. Cas. Bills & N. 128*.

⁵ *Osgood's Adm'rs v. Artt* (C. C.) 17 Fed. 575, *Johns. Cas. Bills & N. 107*.

⁶ *Gorman v. Ketchum*, 33 Wis. 427.

instrument is as much an indorsement as though written upon its back.⁷ It may, for example, be upon its face,⁸ or it may be, and frequently is, where indorsements have covered the back of the paper, upon the extension of the instrument referred to in the principal text as an allonge.⁹ But it must be somewhere upon the bill or note, for if upon a separate paper the transfer is not an indorsement, but an assignment,¹⁰—and the transerrer cannot avail himself of the privileges, nor is he subject to the rules governing indorsement. So, too, in the form of words of an indorsement, the law looks to the intention rather than the method of expression of the parties. For while a signature or some of the forms of words we shall hereafter discuss are the usual forms, yet initials, or figures,¹¹ or writing in pen or

⁷ In *Young v. Glover*, the defendants wrote their names on the face of an accepted bill, under the name of the acceptor. It was contended that this was not an indorsement according to the custom of merchants. The intention of the defendants to assume liability as indorsers being clear, there was held to be a good indorsement, and that the place of writing was immaterial. 3 Jur. (N. S.) 637; *Schwenk v. Yost*, 9 Wkly. Notes Cas. (Pa.) 16.

⁸ *Ex parte Yates*, 27 Law J. Bankr. 9; *HAINES v. DUBOIS*, 30 N. J. Law, 259, Moore Cases Bills and Notes, 107; *Commonwealth v. Butterick*, 100 Mass. 12; *Rex v. Bigg*, 3 P. Wms. 419; *Herring v. Woodhull*, 29 Ill. 92, 81 Am. Dec. 296. But see *Lumbermen's Nat. Bank v. Campbell*, 61 Or. 123, 121 Pac. 427 (N. I. L.); *Germania Nat. Bank of Milwaukee v. Mariner*, 129 Wis. 544, 109 N. W. 574 (N. I. L.).

⁹ *Folger v. Chase*, 18 Pick. (Mass.) 63; *French v. Turner*, 15 Ind. 59. Probably an indorsement on an attached paper would be sufficient, though there was in fact room on the instrument. *Osgood's Adm'rs v. Artt* (C. C.) 17 Fed. 575, per Harlan, J. "The indorsement must be written on the instrument itself or upon a paper attached thereto." N. I. L. § 31. *First Nat. Bank v. McCullough*, 50 Or. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758 (N. I. L.).

¹⁰ *Fenn v. Harrison*, 8 Term B. 757; *Fassler v. Streit*, 92 Neb. 786, 139 N. W. 628. In the former case the indorsement was upon a mortgage which was given with the note as collateral security, and was to this effect: "I hereby assign the within mortgage and notes therein described." This was held not to be a proper indorsement, under the requirement that it should have been made "thereon," or "on another paper annexed, * * * when there are many successive indorsements to be made." *Story, Bills*, § 204.

¹¹ *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

in pencil,¹² or a mark, if they evidence an intention to indorse, can create a binding indorsement. This rule is usually the subject of discussion in interpreting words of transfer on the back of instruments, which seem to imply an assignment rather than indorsement. The most often quoted instance of such an expression is, "I hereby assign this draft."¹³ The interpretation given by the courts to such a form of words, written on instruments in the place where indorsements are usually found, is that the transferrer, in making the writing evidencing a transfer, intended such a transfer as is usually made of such instruments. In other words, he may be reasonably presumed to have intended to turn over the paper in the usual business way, although he did not choose business words peculiarly appropriate for that purpose. The usual business way is by indorsement. Therefore it is reasonable to presume that an indorsement rather than an assignment was intended. And so such words, unless they contain expressions clearly showing an intention to exempt the transferrer from an indorser's liability, are treated as an indorsement.¹⁴ It may be that there is one exception to the foregoing rule, though there is weight of contrary authority. It is that, where one con-

¹² Geary v. Physic, 5 Barn. & C. 234. Stamping the name with a rubber stamp may be an indorsement. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879 (N. I. L.).

¹³ "I hereby assign and transfer the within note" is held an indorsement. Maine Trust & Banking Co. v. Butler, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370; THORP v. MINDEMAN, 123 Wis. 149, 101 N. W. 417, 88 L. R. A. 146, 107 Am. St. Rep. 1003 (N. I. L.), Moore Cases Bills and Notes, 38; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698; Spencer v. Halpern, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120. Contra: Gale v. Mayhew, 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648 (N. I. L.); Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129; Briggs v. Latham, 36 Kan. 205, 13 Pac. 129; Aniba v. Yeomans, 39 Mich. 171. On the question whether such words constitute a qualified or unqualified indorsement, see p. 164, note 54, *infra*.

¹⁴ SEARS v. LANTZ, 47 Iowa, 658, Moore Cases Bills and Notes, 108; Shelby v. Judd, 24 Kan. 166; Fassin v. Hubbard, 55 N. Y. 465; Hall v. Toby, 110 Pa. 318, 1 Atl. 369; Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547; Kilpatrick v. Heaton, 3 Brev. (S. C.) 92.

tracts in the form of a guaranty on the back of a bill or note, he cannot be made liable as an indorser.¹⁵ A guaranty is declared by the courts to mean a guaranty, and not an indorsement.¹⁶ And this one rule of interpretation

¹⁵ In an action on a promissory note it was shown that the payee of a note transferred the same to a third party, having first written over his signature: "I hereby guaranty the within note." It was held by the court that, where the name of the payee was indorsed on the back of the note in no other form than as a signature to a guaranty fully written out, this was not such an indorsement as authorized a subsequent holder to sue upon it as indorsee. *Belcher v. Smith*, 7 CUSH. (Mass.) 482. *CENTRAL TRUST CO. v. FIRST NAT. BANK*, 101 U. S. 68, 25 L. Ed. 876, Moore Cases Bills and Notes, 110. Contra: *Upham v. Prince*, 12 Mass. 14; *Manrow v. Durham*, 3 Hill (N. Y.) 584, and cases cited; *Barrett v. May*, 2 Bailey (S. C.) 1; *Partridge v. Davis*, 20 Vt. 449; *Vanzant v. Arnold*, 31 Ga. 210; *Judson v. Gookwin*, 37 Ill. 286; *Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616; *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35; *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254; *Kellogg v. Latham*, 58 Kan. 43, 48 Pac. 587; *Hendrix v. Bauhard Bros.*, 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688. Where the payee (D.) indorsed, "Pay E. [Signed] D.," and also, "Payment guaranteed. D.," the writing constituted an indorsement. *Elgin City Banking Co. v. Zelch*, 57 Minn. 487, 59 N. W. 544. And see *Tuttle v. Bartholomew*, 12 Metc. (Mass.) 452; *Fullerton v. Hill*, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33, Johns. Cas. Bills & N. 124. As to liabilities of guarantors and sureties, see *Gridley v. Capen*, 72 Ill. 11, Johns. Cas. Bills & N. 209; *Read v. Cutts*, 7 Greenl. (7 Me.) 186, 22 Am. Dec. 184, Johns. Cas. Bills & N. 210; *Temple v. Baker*, 125 Pa. 634, 17 Atl. 516, 3 L. R. A. 709, 11 Am. St. Rep. 926; *Rouse v. Wootten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280 (N. I. L.). See, also, *Pugh v. Sample*, 123 La. 791, 49 South. 526, 39 L. R. A. (N. S.) 834 (N. I. L.); *Union Trust Co. of New Jersey v. McCrum*, 145 App. Div. 409, 129 N. Y. Supp. 1078 (N. I. L.). For distinction between guarantor and surety, see *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805, Johns. Cas. Bills & N. 213.

¹⁶ Where the payment of a note is guaranteed subsequent to its delivery there must be a distinct consideration. Had the guaranty been written before the delivery, no other consideration would have been necessary than that implied in the note. By the statute of the state, since the guaranty did not express any consideration, it is void. *Moses v. Lawrence County Bank*, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743. And see *Leonard v. Vredenburgh*, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; *Tinker v. McCauley*, 3 Mich. 188; *Phelps v. Church*, 65 Mich. 231, 32 N. W. 30; *Hunt v. Adams*, 7 Mass. 518;

differs from the other in that the words are not doubtful words of transfer, but are plain words, having a plain legal meaning. Hence it is not proper for courts to seek to construe the meaning of words which are already settled beyond dispute. It is only their province to enforce the contract in the clear words in which it stands, and that contract they will enforce as a guaranty.¹⁷

BLANK AND SPECIAL INDORSEMENTS

58. **AN INDORSEMENT IN BLANK**—Specifies no indorsee, and an instrument upon which the only or the last indorsement is in blank is in effect payable to bearer and may be negotiated by delivery.¹⁸
59. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser any contract consistent with the character of the indorsement.¹⁹
60. **A SPECIAL INDORSEMENT**—Specifies the person to whom, or to whose order, the instrument is payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument.²⁰
61. An instrument originally payable to bearer, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who, on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it.²¹

Spaulding v. Putnam, 128 Mass. 363; *National Bank of Commonwealth v. Law*, 127 Mass. 72; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335.

¹⁷ *Brown v. Curtiss*, 2 N. Y. 225.

¹⁸ N. I. L. §§ 9 (subd. 5), 34.

¹⁹ This is the language of N. I. L. § 35.

²⁰ This is the language of N. I. L. § 34.

²¹ "Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as

Indorsements in Blank

In form an indorsement in blank consists in writing merely the name of the payee or holder upon the back of the instrument. Thus, if John Smith, in the illustration mentioned in § 12, indorsed the instrument in blank, he would write simply "John Smith" on the back of it. How the courts have interpreted this appears from PEACOCK v. RHODES²² and Grant v. Vaughan,²³ which have been generally adopted as the law.

PEACOCK v. RHODES was a case of a bill indorsed in blank by the payee to a third person, and stolen from the third person, and received by a bona fide purchaser for value. Lord Mansfield said, "I see no difference between a note indorsed in blank and one payable to bearer. They both go by delivery, and possession proves property in both cases," and it was deemed that such a bill is to be treated as so much cash, unless the payee chooses by a specific indorsement to some person to restrain its currency. The court construed the contract to mean that the payor might follow out the contract embodied in the bill, "Pay to John Smith, or such person as he directs," and that, when he so indorsed, he was deemed to say, "You may pay to any one who holds the bill." In Grant v. Vaughan, the maker of a note²⁴ to bearer was sued by Grant, who gave value for the note to a person who had found it, and who had no right to it. It was contended that Grant could only recover from the person from whom he got the note. But the court construed the contract of Vaughan otherwise.²⁵

make title through his indorsement." N. I. L. § 40. Cf. N. I. L. §§ 9 (subd. 5), 34.

²² 2 Doug. 633, Moore Cases Bills and Notes, 112. See, also, Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350 (N. I. L.).

²³ 3 Burrows, 1516.

²⁴ The instrument, though called a note in the report, was a check.

²⁵ See, also, Miller v. Race, 1 Burrows, 452. This was an action in trover to recover a bank note payable to W. F. or bearer, on demand. The note was stolen, and later came into the plaintiff's possession. Upon notice of the robbery, W. F. ordered payment stopped on the note. It was held that such note, when it came into the hands of a third party, for value and without notice, could not be followed.

The student must keep in mind that this relates only to an instrument held by a bona fide holder.²⁶ Where the instrument is not in the possession of a bona fide holder, but of the finder or the thief, this extreme rule does not apply. It cannot be enforced by him. But, when once it is in the hands of the bona fide holder, then it is treated as money in the ordinary course of business. Alike in case of money and of paper indorsed in blank, where either has been stolen or found, the true owner cannot recover after it has been paid away fairly and honestly upon a valuable consideration, because it is necessary for the purposes of commerce that its currency should be established and secured.

Very much like this general power, vested in the payee or subsequent indorser, to vest any lawful holder with the power to enforce the payment of the instrument, is the power conferred upon the indorsee in blank to write over the indorsement any contract consistent with the character of the instrument. In *Russel v. Langstaffe*,²⁷ the defendant indorsed his name in blank on five copper-plate notes, the body of the notes being at that time not filled out. Upon the trial, on behalf of the defendant, it was urged that, because these notes were blank at the time of the indorsement, they were not promissory notes; and that no subsequent act could alter the original nature or operation of the defendant's signature, which, when written, was a mere nullity. Lord Mansfield, in deciding the case, used these often-quoted words: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said: 'Trust Galley to any amount, and I will be his security.'" The amount of the main instrument being left blank, an authority to fill it in for any sum was implied. The terms of the body of the note or bill are the principal terms of

²⁶ As to who is a bona fide holder, see N. I. L. § 52; *Johnson v. Way*, 27 Ohio St. 374, Johns. Cas. Bills & N. 185; *Dresser v. Missouri & I. R. Const. Co.*, 93 U. S. 92, 23 L. Ed. 815, Johns. Cas. Bills & N. 187; *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347, Johns. Cas. Bills & N. 189; *Lenheim v. Fay*, 27 Mich. 70; *Rickle v. Dow*, 39 Mich. 91.

²⁷ 2 Doug. 514.

the contract of indorsement, and nothing inconsistent with these can be implied from the indorsement. Says Judge Cowen:²⁸ "The holder may put the blank paper in any form which shall accord with the intent of the names, either as makers, drawers, payees, or indorsers. This power of the bona fide holder depends upon the intent of the parties not written out in full, but evinced by the character of the slip on which the name appears." Similarly an indorsement in blank signifies not only that it was the payee's or subsequent indorser's mind and wish that the money called for in the instrument should be paid by the maker or acceptor to whomsoever should lawfully have it in his possession, but also that over such indorsement—which may be treated in itself as a blank general power—a subsequent holder might write any modification of the instrument which was not inconsistent nor a material alteration of its terms.²⁹ He may not write over a blank indorsement a waiver of demand and notice;³⁰ or he may not change such an indorsement into a guaranty.³¹ He cannot split up the instrument, making part of the sum called for in it payable to one person, and part payable to another.³² All these change the terms of the contract as they are implied in law. But, if there are successive indorsements in blank, the holder may

²⁸ *Dean v. Hall*, 17 Wend. (N. Y.) 214.

²⁹ *Camden v. McKoy*, 3 Scam. (Hl.) 437, 38 Am. Dec. 91; *Webster v. Cobb*, 17 Ill. 459; *Hance v. Miller*, 21 Ill. 636; *Maxwell v. Vansant*, 46 Ill. 58; *Boynton v. Pierce*, 79 Ill. 145; *Tenney v. Prince*, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; *President, etc., of Central Bank v. Davis*, 19 Pick. (Mass.) 373. But see *Allen v. Coffil*, 42 Ill. 293. In *Dale v. Gear* it was held that parol evidence was not admissible to prove that an indorsement in blank of a promissory note was to be considered as without recourse by a special agreement between the parties, where there was no evidence of any agency or equity as between them. 38 Conn. 15, 9 Am. Rep. 353. The holder under a blank indorsement may write over it an order to pay to another. *Evans v. Gee*, 11 Pet. 80, 9 L. Ed. 639.

³⁰ *President, etc., of Central Bank v. Davis*, 19 Pick. (Mass.) 373.

³¹ *Seabury v. Hungerford*, 2 Hill (N. Y.) 80; *Blatchford v. Milliken*, 35 Ill. 434; *Seymour v. Mickey*, 15 Ohio St. 515; *Biden v. Hann*, 61 Iowa, 42, 15 N. W. 591.

³² *Erwin v. Lynn*, 16 Ohio St. 547; *Lindsay v. Price*, 33 Tex. 282. See N. I. L. § 32.

fill up the first, last, or any other to himself;³³ or he may fill up none,³⁴ or he may strike out any or all,³⁵ or he may turn the instrument over to a stranger without indorsement by him;³⁶ or he himself may indorse it specially to a stranger;³⁷ for all these instances in no wise change the tenor of the main instrument, or effect an alteration in the letter or the spirit of its terms.

Same—Parol Evidence

Whether parol evidence is admissible to contradict or vary the implied terms of a blank indorsement is a question upon which there is much conflict of authority. It is held by some cases that the rule excluding parol evidence, while applicable to special indorsements, which express the contract, is not applicable to blank indorsements, under which the contract arises by implication of law.³⁸ The prevailing view, however, is that there is no distinction in this respect between these two classes of indorsements, since the contract implied by the blank indorsement is as definite as if it were expressed.³⁹ Mr. Daniel states that there are three

³³ N. I. L. § 35. In *Day v. Lyon* it was held that although, by an indorsement in blank, the transferee was authorized to fill in the blank, he must do so before submitting the note in evidence in a suit thereon. 6 Har. & J. (Md.) 140. See *Brewster v. Dana*, 1 Root (Conn.) 266; *Peaslee v. Robbins*, 3 Metc. (Mass.) 184. But the completion of an indorsement in blank is no longer necessary. An instrument payable to order on its face, upon which the only or the last indorsement is in blank, is by section 9, subd. 5, of the N. I. L., payable to bearer. See *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873 (N. I. L.); *State v. Hinton*, 56 Or. 428, 109 Pac. 24 (N. I. L.).

³⁴ N. I. L. § 9 (subd. 5).

³⁵ N. I. L. § 48; *King v. Bellamy*, 82 Kan. 301, 108 Pac. 117 (N. I. L.). Striking out an indorsement releases the indorser whose indorsement is canceled and all subsequent indorsers. N. I. L. § 48.

³⁶ N. I. L. § 9 (subd. 5).

³⁷ N. I. L. § 30 (last clause).

³⁸ *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. C. C. 480, Fed. Cas. No. 13,635; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Davis v. Morgan*, 64 N. C. 570; *Commissioners of Iredell Co. v. Wasson*, 82 N. C. 312.

³⁹ *Day v. Thompson*, 65 Ala. 269; *Crocker v. Getchell*, 23 Me. 392; *Barry v. Morse*, 3 N. H. 132; *Bank of Albion v. Smith*, 27 Barb.

classes of cases in which parol evidence is admissible as between indorser and indorsee, not to contradict or vary the contract imported by the instrument, but to impeach the validity of the indorsement.⁴⁰ (1) Evidence is admissible to show that the indorsement was without consideration; for example, that it was for the accommodation of the indorsee, or for collection, or to transfer the legal title to one in fact the owner. (2) Evidence is admissible to show that the indorsement was in trust for a special purpose, or as an escrow. (3) Evidence is admissible to show that the indorsement was obtained by false representations, so that the enforcement of the contract of indorsement would operate as a fraud upon the indorser. It is also held by some cases that the indorser may, as against his indorsee, prove a contemporaneous parol waiver of demand or notice of dishonor, but the opposite view is also held.⁴¹ A discussion of the conflicting authorities upon the effect of collateral agreements cannot be undertaken in an elementary work.⁴²

Special Indorsement

A special indorsement is in form commonly in this wise: If it were by John Smith, the payee in the illustration under §§ 12 and 13, it would be, "Pay to the order of John Jones," or "Pay to John Jones, or order," or simply, "Pay John Jones." While the special indorsement, or the in-

(N. Y.) 489; *Woodward v. Foster*, 18 Grat. (Va.) 200; *Holton v. McCormick*, 45 Ind. 411; *Schnell v. North Side Planing Mill Co.*, 89 Ill. 581; *Clarke v. Patrick*, 60 Minn. 269, 62 N. W. 284; *Burwell v. Gaylord*, 119 Minn. 426, 138 N. W. 685; *Doolittle v. Ferry*, 20 Kan. 230, 27 Am. Rep. 166; *Farr v. Ricker*, 48 Ohio St. 265, 21 N. E. 354; *Kling v. Kehoe*, 58 N. J. Law, 529, 33 Atl. 946; *Van Vleet v. Sledge* (C. C.) 45 Fed. 743; *MERCHANTS' NAT. BANK v. BENTEL* (Cal.) 137 Pac. 25; *First Nat. Bank v. Powell* (Tex. Civ. App.) 149 S. W. 1096. Compare *Security Trust & Life Ins. Co. v. Stuart* (Tex. Civ. App.) 163 S. W. 396. Prof. Ames, however, maintains the opposite view. 2 Ames Cas. Bills & N. 804.

⁴⁰ Daniel, Neg. Inst. § 720 et seq.

⁴¹ Daniel, Neg. Inst. § 719a; Rand. Com. Paper, § 784. See chapter IX.

⁴² The subject is fully discussed in Daniel, Neg. Inst. §§ 717-723; Rand. Com. Paper, §§ 778-784; Wigmore, Evidence, §§ 2443-2445.

dorsement in full, as it is indifferently called, must name the indorsee, the indorsement need not necessarily be in words negotiable. It may be either "Pay to John Jones," or "Pay to the order of John Jones."⁴³ In either case John Jones may negotiate the note away. This is because the original instrument was negotiable. It contemplated its passing from hand to hand. Hence, in the illustration, John Smith, the payee, may direct that the instrument be paid to John Jones, and John Jones, upon delivery, being the owner, may direct that it be paid to Thomas Robinson, and the maker must pay to Thomas Robinson, or to John Jones, or to John Smith; so, also, must John Jones pay to Robinson, because Robinson has a right of action against Jones, and Jones against Smith; hence Robinson has also a right of action against Smith.⁴⁴

When upon an instrument payable to order the only or the last indorsement is special, title can be transferred from the indorsee only by his indorsement.⁴⁵ Such an instrument so indorsed must be sharply contrasted with a bill or note on its face payable to bearer and with one payable to order upon which the only or the last indorsement is in blank. In the case of such instruments the possessor is the owner.⁴⁶ Possession and title are one and the same thing, and this though the party possessing it is in no wise

⁴³ "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise." N. I. L. § 47. "But the mere absence of words implying power to negotiate does not make an indorsement restrictive." Id. § 36. *Leavitt v. Putnam*, 3 N. Y. 494, 53 Am. Dec. 322; *Edie v. East India Co.*, 1 W. Bl. 295, 2 Burrows, 1216. In the latter case it was claimed that a special indorsement to A. B., the words "or order" being omitted, was equivalent to a restrictive indorsement; but it was held that, since the bill in its origin was negotiable, whatever indorsement carried the property carried the power to assign it. In *More v. Manning* the holding was to the same purpose. An assignment was made to W., and not to him and order; and it was claimed that W. could not assign, for, by so doing, W.'s assignor would be liable to suit by subsequent indorsees. It was held that the assignee of a bill has all the interest in it, and may assign to whom he pleases. *Comyn*, 311. *Hodges v. Adams*, 19 Vt. 74, 46 Am. Dec. 181.

⁴⁴ N. I. L. § 68.

⁴⁵ N. I. L. § 34.

⁴⁶ N. I. L. §§ 9 (subd. 5), 30.

a party to the instrument. But where the direction in the contract is to pay specially to some person, that person and no other can direct that the money is to be paid.⁴⁷ No other person can personate this indorsee, and by forgery satisfy the conditions of this contract. And it does not avail even that the bill is paid under a forged indorsement. Such payment or transfer was not in contemplation of the parties making the contract, and is utterly void.⁴⁸

An instrument payable to order, upon which the only or the last indorsement is in blank, may be specially indorsed. The effect of such an indorsement is that the instrument ceases to be transferable by delivery and requires the indorsement of the special indorsee for its transfer.⁴⁹ An instrument payable to bearer on its face may also be special-

⁴⁷ Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496; BURCH v. DANIEL, 101 Ga. 228, 28 S. E. 622, Moore Cases Bills and Notes, 112; Mead v. Young, 4 Term R. 28. In the case of Mead v. Young, a note was drawn on defendant, payable to "Henry Davis or order," but came into possession of another Henry Davis. The bill was accepted by defendant, and the plaintiff, being requested by Davis to discount it, inquired of defendant if the acceptance was his. This being affirmed, the bill was discounted, the plaintiff not knowing Davis. It was held, on an action being brought, that as no person can demand payment of a bill of exchange but the payee, or the person authorized by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person, and if he makes such payment it will not discharge his debt to the drawer.

⁴⁸ Graves v. American Exch. Bank, 17 N. Y. 205; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; Chambers v. Union Nat. Bank, 78 Pa. 205; Espy v. First Nat. Bank, 18 Wall. 604, 21 L. Ed. 947.

⁴⁹ This seems the proper interpretation of N. I. L. §§ 9 (subd. 5), 34, 40. See McKeehan, The Negotiable Instruments Law, 41 Am. Law Reg. N. S. 454-462, reprinted in Brannan, Anno. N. I. L. (2d Ed.) 234-241. See, also, articles by Professor Ames and Judge Brewster referred to by McKeehan, and also reprinted in Brannan, Anno. N. I. L. (2d Ed.). If this is the correct interpretation of these sections, the rule of SMITH v. CLARKE, Peake, 295, 1 Ames Cas. Bills & N. 315, Moore Cases Bills and Notes, 113, that a special indorsement upon an instrument payable to order and indorsed in blank has the same effect as such an indorsement upon an instrument payable to bearer on its face, is no longer law in those jurisdictions where the N. I. L. is in force.

ly indorsed; but the instrument, notwithstanding the special indorsement, continues transferable by delivery. The special indorser, however, is liable only to persons who make title through the indorsement of his special indorsee;⁵⁰ i. e., to persons holding under the blank or special indorsement of such indorsee, or of his indorsee, etc. Suppose, for example, the following to be a series of indorsements: (1) John Smith. (2) Pay to the order of Thomas Robinson. Richard Roe. If the instrument upon which these indorsements appeared were one on its face payable to order, no person in possession of it would be entitled as holder to charge either the maker, or John Smith, the first indorser, or Richard Roe, the second indorser, except Thomas Robinson, the special indorsee. But if the instrument were on its face payable to bearer, any person in possession of it would be the holder, and as such entitled to enforce the obligations of the maker, and of John Smith, who indorsed in blank. No one, however, except Thomas Robinson, could charge Richard Roe, the special indorser.

INDORSEMENT WITHOUT RE COURSE, CONDITIONAL AND RESTRICTIVE INDORSEMENT⁵¹

62. AN INDORSEMENT WITHOUT RE COURSE—

Means that the indorser exempts himself from liability to indemnify the holder upon the dishonor of the bill or note.

63. A CONDITIONAL INDORSEMENT—Means an indorsement by which the title to the instrument

does not pass until the condition mentioned in the indorsement is fulfilled.

⁵⁰ N. I. L. § 40; RIDER v. TAINTOR, 4 Allen (Mass.) 356, Moore Cases Bills and Notes, 113; Johnson v. Mitchell, 50 Tex. 212, 32 Am. Rep. 602.

⁵¹ "An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional." N. I. L. § 33. The N. I. L. denominates indorsements without recourse qualified indorsements. Section 38.

64. A RESTRICTIVE INDORSEMENT—Means that the indorsee is deputed by the indorser to be his agent in collecting the bill or note, or else that the title is vested in the indorsee as a trustee or for the use or for the benefit of a third person.

We have seen that, whether an indorser makes a blank or a special indorsement upon the instrument, he both incurs a liability as an indorser thereon, and transfers it. This is true of indorsements generally, whatever be their form, provided the intention to be bound and to transfer be present. If these can be construed from its form, it is sufficient to make the writing an indorsement. For example, the words, "I this day sold and delivered to C. A. the within note," ⁶² were deemed an indorsement. And any form of words consistent with the tenor of the main instrument, and showing such intention, will be treated by the courts as creating the contract.

The needs of commerce have created special forms of indorsement modifying and limiting the effect of this contract, without, in many instances, destroying the negotiability of the main instrument. For example, an indorser may exempt himself from liability as an indorser by an indorsement without recourse, and yet the instrument remain negotiable. He may perhaps, by a conditional indorsement, give all subsequent parties notice that, so far as he is concerned, the title to the instrument has not vested in his indorsee and subsequent parties, and that the instrument cannot be safely paid to the holder until some condition written upon it is fulfilled; or he may make a restrictive indorsement. The reason of these indorsements is to be kept carefully in mind while examining them. They are based upon the idea that the right of property in the lawful owner implies the right, not merely to sell it outright, but also to make such disposition of it as he sees fit.

⁶² Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547; Pinnes v. Ely, 4 McLean, 173, Fed. Cas. No. 11,169; ante, p. 152.

Indorsement without Recourse

The indorsement without recourse is in form of words, "Without recourse," or "Sans recourse," or "At the indorsee's own risk,"⁵³ or "I hereby indorse and transfer my right and interest in this bill to C. D., or order, but with this express condition: that I shall not be liable to him or to any subsequent holder for the acceptance or payment of the bill."⁵⁴ Such indorsements do not charge subsequent transferees with notice of personal defenses available against the qualified indorser.⁵⁵ Such an indorser does not escape from the effect of the warranties, as explained hereafter.⁵⁶ The promisee of a negotiable bill or note indorses it to a third person, merely stipulating that, as the indorser, he is not to be responsible if the acceptor or maker does not pay it. This he may do, because he has the property in the bill or note, and he may dispose of it on what terms he pleases. Such an indorsement does not render

⁵³ N. I. L. § 38; *Rice v. Stearns*, 3 Mass. 225, 3 Am. Dec. 129; *Richardson v. Lincoln*, 5 Metc. (Mass.) 201; *President, etc., of Fitchburg Bank v. Greenwood*, 2 Allen (Mass.) 434; *Welch v. Lindo*, 7 Cranch, 159, 3 L. Ed. 301; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Craft v. Fleming*, 46 Pa. 140; *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524 (N. I. L.), *semble*; *Stevenson v. O'Neal*, 71 Ill. 314; *Walter v. Kirk*, 14 Ill. 55. If the words "without recourse" appear between two indorsements, it may be shown by extrinsic evidence which indorsement they qualify. *Goolrick v. Wallace*, 154 Ky. 596, 157 S. W. 920 (N. I. L.).

⁵⁴ Chit. Bills, 235. "I hereby transfer and assign all my right, title and interest in and to the within note" has been held an indorsement without recourse. *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (N. I. L.); *Spencer v. Halpern*, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120. But "I assign the within note" is an unqualified indorsement. *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698; *Maine Trust & Banking Co. v. Butler*, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370.

⁵⁵ N. I. L. § 38; *Lomax v. Picot*, 2 Rand. (Va.) 280; *EPLER v. FUNK*, 8 Pa. 468, *Moore Cases Bills and Notes*, 114; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068 (N. I. L.); *Hatch v. Barrett*, 34 Kan. 223, 8 Pac. 129.

⁵⁶ *Frazer v. D'Invilliers*, 2 Pa. 200, 44 Am. Dec. 190; *HANNUM v. RICHARDSON*, 48 Vt. 508, 21 Am. Dec. 152, *Moore Cases Bills and Notes*, 134; *Dumont v. Williamson*, 18 Ohio St. 516, 98 Am. Dec. 186; *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181.

the negotiable security no longer negotiable.⁵⁷ The bill or note remains negotiable in the hands of the indorsee, although he has no remedy against the indorser without recourse. And, into whose hands soever the bill or note may come, the maker is still liable according to the terms of his original contract.⁵⁸ The question with the courts in construing indorsements without recourse is whether the words of the indorsement are such that they clearly express an intention on the part of the indorser not to be bound, and a corresponding intention on the part of the immediate subsequent indorsees, evidenced by their acceptance of the instrument with such an indorsement, to exempt the indorser from his liability.⁵⁹ The presumption is rather that the usual liability of an indorser is intended to be incurred. And, to overcome this, it must clearly appear that the transfer of the instrument was only to transfer the title to it, and not to indemnify the indorsee against loss in case it was not paid by the acceptor or maker.⁶⁰

Conditional Indorsement

The conditional indorsement is a device by which a payee or an indorsee may part with the possession of an instrument, but not with the legal title to it. Mr. Daniel instances "Pay to A. B., or order, if he arrives at 21 years of age," or "Pay to A. B., or order, unless before payment I give you notice to the contrary," as examples of conditional indorsements, the former being an indorsement upon a condition precedent, and the latter one upon a condition subsequent.⁶¹ These conditional indorsements have not come very often before the courts, but they are recognized as a distinct class. It may be said, by way of criticism, that in them commercial convenience has overridden the strict theory of negotiability. This theory would not permit to exist a condition which charged every subsequent indorsee with the duty of seeing whether the condi-

⁵⁷ Russel v. Ball, 2 Johns. (N. Y.) 50; Borden v. Clark, 26 Mich. 410.

⁵⁸ Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

⁵⁹ Fassin v. Hubbard, 55 N. Y. 465.

⁶⁰ See N. I. L. § 88.

⁶¹ Daniel, Neg. Inst. § 697.

tion had been fulfilled before he could legally own the instrument. For, certainly, with the conditional indorsement, as well as with the conditional bill or note, it would be a most effective restriction to circulation as a medium of payment. With this criticism in mind, it is well to note the authority usually referred to as the leading case upon the subject—ROBERTSON v. KENSINGTON.⁶² There this indorsement was made upon an ordinary draft: "Pay the within sum to Messrs. Clerk & Ross, or order, upon my name appearing in the 'Gazette' as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date." This was transferred to bona fide holders, and the acceptors paid the bill on its maturity to one of these. In the meantime the indorser's name had never appeared in the Gazette as an ensign, and he brought suit as the payee of the bill against the acceptors who had accepted the bill after this indorsement had been written upon it. And it is to be inferred from the report of the case that the court decided that such an indorsement was only a conditional transfer of the absolute interest in the bill, and, its condition never having been performed, the transfer was defeated. As appears from the cases, the point emphasized is that the condition operates as notice, and, being merely a notice, it does not destroy the negotiability of the bill or note. Thus, where a note in usual form had these words upon it, signed by the makers, "The within obligation is to be delivered to the payees of the note as a consideration for a judgment which was to be assigned to the makers,"⁶³ the court properly said the words were no part of the note. Their effect was only to show the consideration, and to operate as a notice to any person who might purchase the note. By this was meant that it was the intention of the parties that it was not to affect the original contract. And in cases of conditional indorsement, when it is not the intention of the original parties that the

⁶² ROBERTSON v. KENSINGTON, 4 Taunt. 30, Moore Cases Bills and Notes, 115.

⁶³ Sanders v. Bacon, 8 Johns. (N. Y.) 485; Tappan v. Ely, 15 Wend. (N. Y.) 363.

main instrument should be contingent, the act of the conditional indorser is not to be understood as operating to change the main instrument. The terms of the face of the instrument still remain an absolute negotiable order or promise of payment to some one. That some one might in turn negotiate the bill or note to some one else, who in his turn might continue his negotiation until it came to the conditional indorser. But he, on parting with it, having the right of property in himself, might make a special contract which would be distinct from the contract embodied on the face of the instrument. And the only purpose and result of this contract would be to notify every holder subsequent to himself, and the maker or acceptor, when the time for the payment of the instrument arrived, that he as an indorser parted with the instrument upon the understanding that his ownership of it was not to cease until some stated condition was fulfilled. As between the immediate indorser and indorsee, there can be little doubt that this is a correct and proper rule. As to them the contract of indorsement is but an ordinary contract, open to all objections and defenses to which other contracts are open. Some of these objections and defenses may even be shown by parol evidence.⁶⁴ This is because the contract consists partly of the written indorsement, partly of the act of delivery of the bill to the indorsee, and partly of the mutual intention with which the delivery is made by the indorser and received by the indorsee.⁶⁵ But when the question is not one between the immediate indorser and indorsee, but between that indorser or indorsee and third parties holding in good faith and for value, it becomes much more embarrassing. It is clear that parol evidence or evidence of inten-

⁶⁴ *Bookstaver v. Jayne*, 60 N. Y. 146; *Sawyer v. Chambers*, 44 Barb. (N. Y.) 42. See *Daniel, Neg. Inst.* §§ 717, 723, as to classification of defenses which may be shown by parol evidence. *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Hartley v. Wilkinson*, 4 Maule & S. 25; *Cholmeley v. Darley*, 14 Mees. & W. 343; *Leeds v. Lancashire*, 2 Camp. 205.

⁶⁵ *Bruce v. Wright*, 8 Hun (N. Y.) 548; *Benton v. Martin*, 52 N. Y. 570; *Prentiss v. Graves*, 33 Barb. (N. Y.) 621; *Ocean Bank v. Dill*, 39 Barb. (N. Y.) 577.

tion cannot be allowed to ingraft a condition upon the instrument such that it will affect third parties.⁶⁶ But where the indorsement is in writing, the rule is so far settled that the maker or acceptor and probably prior parties are bound to take notice of the title of the indorsee, and, having such notice, they pay the instrument to him or to subsequent parties at the risk of repayment to the conditional indorser, if the condition is unfulfilled.⁶⁷ But, on the other hand, the conditional indorser cannot restrict the negotiability of the instrument and prevent its further indorsement by his indorsee.⁶⁸ The terms of the original instrument making it negotiable prevail, and persons other than the conditional indorsee may take it subject to the notice of the condition. And though there is little, if any, authority upon the point, still it may be assumed that in the absence of an express warranty no other than a conditional warranty of title in the subsequent indorser would be implied.⁶⁹ There seems to be no reason why the other implied warranties should not remain a part of the contract. But the notice of a conditional title with which the subsequent purchaser of the instrument would be charged would seem to expressly except warranty of title from the obligations of the indorser.

Restrictive Indorsement

The last of these peculiar classes of indorsements originating in the needs of commerce is the restrictive indorsement. It is of two kinds.⁷⁰ The first and commonest va-

⁶⁶ Byles, Bills, p. 155; Willse v. Whitaker, 22 Hun (N. Y.) 242.

⁶⁷ ROBERTSON v. KENSINGTON, 4 Taunt 30, Moore Cases Bills and Notes, 115; Savage v. Aldren, 2 Starkie, 232. "Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally." N. I. L. § 39. This section changes the law.

⁶⁸ Soares v. Glyn, 8 Q. B. 24, 14 L. J. Q. B. 313.

⁶⁹ Mandeville v. Newton, 119 N. Y. 10, 23 N. E. 920.

⁷⁰ "An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee

riety, and the one which is generally spoken of by the text writers as the restrictive indorsement, is that where the holder deputes to some other person the business of collecting the bill; the other where the holder indorses the instrument to one person for the use or benefit of, or as the trustee of, another. Upon an indorsement of the first kind the instrument is no longer negotiable; the second variety of indorsement does not, however, restrict its circulation. Examples of the first species of indorsement are indorsements "For collection,"⁷¹ the indorsement for collection meaning that the holder takes no title to it and can transfer none, but can merely present it and receive the money upon it.⁷² In construing these and other cases like them, such

the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive." N. I. L. § 36. The first and second subdivisions cover the first class of indorsements discussed in this paragraph, the third subdivision the second class. "A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement." Id. § 37. This section declares the law substantially as stated in this paragraph.

⁷¹ National City Bank of Brooklyn v. Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771; Rand. Com. Paper, 726. So an indorsement on a check by a bank: "Indorsement guaranteed. Pay any national or state bank or order"—is only an indorsement for collection, and does not transfer the beneficial title to the indorsee. National Bank of Rolla v. First Nat. Bank of Salem, 125 S. W. 513, 141 Mo. App. 719 (N. I. L.). It is generally held that indorsement "for deposit" passes title. National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; Wasson v. Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342; Security Bank of Minnesota v. Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987. Beal v. City of Somerville, 1 C. C. A. 598, 50 Fed. 647, 17 L. R. A. 291, contra.

⁷² Sigourney v. Lloyd, 8 Barn. & C. 622; Lloyd v. Sigourney, 5 Bing. 525; White v. Miners' Nat. Bank, 102 U. S. 658, 26 L. Ed. 250. The indorsee "for collection" may bring suit in his own name. Boyd v. Corbitt, 37 Mich. 52; Wilson v. Tolson, 79 Ga. 137, 3 S. E. 900; Rand. Com. Paper, § 726. Rock County Nat. Bank of Janesville v.

as "Pay to A. only,"⁷³ or "Pay to A. for my use,"⁷⁴ or "Pay to A. for me,"⁷⁵ or "Pay to my steward and no other person," or "Pay to my servant for my use,"⁷⁶ the courts have been governed by two principles. The first and most important is the reason that the natural construction of such a form of words is that it implies a mere authority to receive the money called for in the instrument for the use of the indorser himself, or according to his directions. Such an indorsement therefore constitutes the indorsee a trustee for his indorser, and shows that he, at least, did not give a valuable consideration for the bill or note and is not therefore its beneficial owner. It follows from this that the restrictive indorser, in creating such a trust, did not intend to pass the beneficial title to the indorsee, but rather to retain it in himself. And hence the instrument cannot be negotiated by the restrictive indorsee in breach of trust.⁷⁷ The second is the reason that the restrictive indorsement, like the conditional indorsement, operates as notice both to the persons called upon to pay the instrument and those who might acquire it after the indorsement as purchasers. No subsequent purchaser could take the instrument in good faith, because whoever reads the indorsement, as it would be every purchaser's legal duty to read it, must see that its operation was limited. Such a purchaser must see that the object of the indorser was to prevent the money received

Hollister, 21 Minn. 385 (under statute requiring action to be prosecuted in name of real party in interest), contra. See Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363. Under section 38 (subd. 2), N. I. L., the restrictive indorsee may sue in his own name.

⁷³ Power v. Finnie, 4 Call (Va.) 411.

⁷⁴ Lloyd v. Sigourney, 5 Bing. 525.

⁷⁵ Williams v. Potter, 72 Ind. 354.

⁷⁶ Edie v. East India Co., 2 Burrows, 1221.

⁷⁷ A restrictive indorser of a bill or note, to whom it has been returned by his indorsee, is the holder of the instrument, and entitled to enforce it without striking out the restrictive indorsement. New Haven Mfg. Co. v. New Haven Pulp & Board Co., 76 Conn. 126, 55 Atl. 604 (N. I. L.). See, also, Jerman v. Edwards, 29 App. D. C. 535 (N. I. L.); National Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513 (N. I. L.).

from being applied to the use of any other person than himself. And therefore, to whomsoever the money might be paid, it would be paid in trust for the indorser, and wheresoever the instrument traveled it carried that trust on the face of it.⁷⁸ But there is a class of so-called restrictive indorsements which has a very different construction at the hands of the courts. The words in which these indorsements are framed are such as "Pay to A. or order for the use of B."⁷⁹ and "Pay to the order of A. for the benefit of B."⁸⁰ The meaning of these words is declared to be that

⁷⁸ *Lloyd v. Sigourney*, 5 Bing. 525. In this case the indorsement was to this effect: "Pay to S. W., or order, for my use. Henry Sigourney." It was held that such indorsement was restrictive, and was sufficient to put a purchaser of such bill upon inquiry, since it indicates that the holder is simply acting as the agent for the one for whose use he is holding. *Ancher v. Bank of England*, 2 Doug. 637; *BLAINE, GOULD & SHORT v. BOURNE & CO.*, 11 R. I. 119, 23 Am. Rep. 429, *Moore Cases Bills and Notes*, 117. See *Williams, Deacon & Co. v. Shadbolt*, 1 Cababé & Ellis, 529 (B. E. A.); *Citizens' State Bank v. E. A. Tessman & Co.*, 121 Minn. 34, 140 N. W. 178.

⁷⁹ *Evans v. Cramlington, Carth.* 5, affirmed in the Exchequer Chamber 2 Vent. 309.

⁸⁰ *HOOK v. PRATT*, 78 N. Y. 371, 34 Am. Rep. 539, *Moore Cases Bills and Notes*, 121. In this case the payee, who was also drawer, of a draft indorsed it to the order of Mrs. Mary Hook "for the benefit of her son Charlie." In an action by her, as trustee of her son, against the executors of the drawer, it was held that she could maintain the action. Rapallo, J., said: "She was constituted trustee of her son, and held the legal title. The indorsement gave notice of the trust, so that, if she had passed it off for her own debt, or in any other manner indicating that the transfer was in violation of the trust, her transferee would take it subject to the trust, but there was nothing reserved to the drawer and indorser. * * * The presumption is that the draft was drawn and indorsed by him for a consideration received either from the indorsee or the beneficiary." See ante, p. 102. In *Treuttel v. Barandon*, 8 Taunt. 100, the indorsement was in form "Pay to A. or order for account of B." (a third person). This would seem to transfer the legal title to A. in trust for B., yet it was held that B. could maintain trover for the value of the bill against one with whom A. had deposited it for cash advances. This bill was properly negotiable, like the draft in *HOOK v. PRATT*, subject to the trust. "The plaintiff, who was cestui que trust, seems clearly to have misconceived his action in bringing trover against his trustee; but the point was not taken." 2 Ames Cas. Bills & N. 837.

on making such an indorsement the indorser intended to part with his whole title to the instrument. The indorsee is a trustee for the designated beneficiary. For this reason the indorsement must be presumed to have been made upon a consideration. And being thus a transfer, with its operation limited to the right of the indorsee to apply its proceeds to the benefit of some person other than himself, the instrument could in turn be transferred, and so the paper continued negotiable. And because it was negotiable it was a pledge of the credit of the restrictive indorser. It is settled that an indorsement "Pay to A." does not restrict the negotiation of the instrument, because the intention of the original parties to make the instrument negotiable prevails over the absence of words of negotiability in the indorsement.⁸¹ And for the same reason, with these forms of words the instrument should continue negotiable unless it expressly appears from the contract between the indorser and indorsee that the indorser intended to absolve himself from liability as an indorser and to destroy the effect of the general rule that the indorsee, having possession of the instrument, was its owner.⁸²

NATURE OF INDORSEMENT

65. The nature of an indorsement is as follows: It is

- (a) A contract which the indorser assumes with his indorsee and subsequent holders that, if the drawee, acceptor, or maker fails to honor the bill or note, he will, upon the performance of certain conditions imposed by the law merchant, indemnify the holder for all loss incurred by reason of the dishonor of the bill or note.
- (b) A transfer of the title to the instrument.⁸³

⁸¹ N. I. L. § 36; *Eddie v. East India Co.*, 1 W. Bl. 295, 2 Burrows, 1216; *More v. Manning*, Comyn, 311; *Leavitt v. Putnam*, 3 N. Y. 494, 53 Am. Dec. 322.

⁸² While these views seem sound, it must be admitted that the distinction between these two classes of restrictive indorsements is

⁸³ 2 Ames, Bills & N. p. 837.

Perhaps the most important aspect of the indorsement is that it is a distinct contract. It gives it all the effect of a new instrument as against the indorser, though it does not in fact create a new instrument. Every indorser of a bill is a new drawer, and it is a part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him.⁸⁴ The first legal fact of the theory with which the student should familiarize himself is that, from the form of words which we have already given as common methods of indorsement, the courts have created a peculiar class of rights and liabilities. The main terms of the contract are found on the face of the bill or note. In the illustrations under §§ 12 and 13, for example, the main terms were an order or promise to pay at a given time and place a certain sum of money, either to some specified person or to such person as he might direct. The indorser in his contract adopts and ratifies each of these terms, and makes them the main terms of his own contract. This idea will perhaps be made more clear by saying that if, in the illustration under § 13, John Smith had indorsed the note: "Pay to John Jones. [Signed] John Smith"—John Jones could negotiate it further, despite the indorsement was not in the negotiable form of "Pay to Jones, or order." This is because, by the terms on the face of the instrument, the maker, Thomas Robinson, had promised to pay "to order." This means that he had put into circulation a promise to pay money not only to John Smith, but to any one who might legally hold the instrument. And, except in case of John Smith's making a restrictive indorsement to an agent without intention on his part to transfer his beneficial interest, the indorsement of John Smith would be construed only as an adoption of the promise of Thomas Robinson,

not always clearly recognized by the text-books. See Daniel, Neg. Inst. §§ 698, 699; Edw. Bills & N. § 395; Tied. Com. Paper, § 268; Rand. Com. Paper, §§ 724-727. But see 2 Ames, Bills & N. p. 837.

⁸⁴ Penny v. Innes, 1 Cromp., M. & R. 439; McCamant v. Miners' Trust Co. Bank, 15 Wkly. Notes Cas. (Pa.) 122.

which was that the note might pass from hand to hand ad infinitum, until Robinson paid it.⁸⁵

But there is more embodied in the contract of the indorser than the terms which are found in the face of the instrument. And these are the terms which are implied in and made a part of the contract by the law. As we have seen, a part of the contract of the indorser is that it is a contract of indemnity.⁸⁶ The right to this indemnity accrues only upon the fulfillment of certain conditions which are conditions precedent to its enforcement.⁸⁷ The indorser is in law the drawer of a bill.⁸⁸ With reference to his indorsee he stands precisely in the position of the drawer of a bill. If the instrument be a bill, he may be supposed to have assets in the hands of the drawee and to give the indorsee an order for the payment of them. In the case of a note the considerations existing between the payee and the maker may be supposed to exist between him and his indorsee. But by the mere non-payment of the instrument in the first instance the indorser breaks no contract, because his contract is separate and apart from that of the original parties.⁸⁹ The contract which the law puts into his mouth

⁸⁵ Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Edie v. East India Co., 1 W. Bl. 295, 2 Burrows, 1216.

⁸⁶ Byles, Bills, p. 154; Edw. Neg. Inst. § 384; Story, Prom. Notes, § 135.

⁸⁷ Musson v. Lake, 4 How. 262, 11 L. Ed. 967; Cuyler v. Stevens, 4 Wend. (N. Y.) 566; Cayuga County Bank v. Warden, 1 N. Y. 413.

⁸⁸ Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137. In this case the following was held: No principle seems more fully settled or better understood in commercial law, than that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill.

⁸⁹ In Rothschild v. Currie, it was held that the indorser contracts to pay not primarily or absolutely, but on two conditions: dishonor by drawee or acceptor; and due notification to himself of such dishonor. Being in law a new drawer of the bill, the same state of things is supposed to exist between him and the indorsee, as the law supposes between the drawer and payee. 1 Q. B. 43. In Matthews v. Bloxsome, 33 Law J. 209, the defendant, intending to become surety for A., put his name at the back of a blank bill stamp. The bill was then filled up by plaintiffs as drawers, payable to their own order. As he gave authority to fill out the bill, the defendant was

when he writes his name on the back of the instrument is payment on his part according to the terms of the original instrument, with the added conditions of due presentment, dishonor, and notice of dishonor. His contract therefore is that he will pay according to the original terms of the instrument, provided there have been due and proper presentment, dishonor, and notice of dishonor by the holder.⁹⁰

As a Transfer

The last general element of an indorsement is that it is a transfer of the title to the instrument.⁹¹ It is sufficient here to say, in general terms, that by this is meant nothing more than that it is a mere purchase and sale of a piece of property. The indorser or transferrer is viewed in many respects as a vendor, and the indorsee or transferee as a vendee. It is, of course, not tangible property, but a chose in action.

REQUISITES OF INDORSEMENT

66. The requisites of an indorsement are as follows:

- (a) It must follow the tenor of the bill or note.
- (b) It must be by the payee or a subsequent holder.
- (c) It is only complete upon delivery.

in the same position as an indorser after the bill had been drawn, and might be treated as a new drawer. 33 Law J. Q. B. 209.

⁹⁰ N. I. L. § 66 (last par.); Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 151, 24 Atl. 136, 16 L. R. A. 295, Johns. Cas. Bills & N. 109; May v. Coffin, 4 Mass. 341; Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62; Bryant v. Faries, 15 Ill. App. 414.

⁹¹ Cock v. Fellows, 1 Johns. (N. Y.) 143; Prevot v. Abbott, 5 Taunt. 786. In this case the plaintiff averred delivery to him by the defendant, and also the facts of acceptance, presentment for payment, and dishonor. Judgment for plaintiff was arrested after verdict for the reason that indorsement by the defendant had not been averred. Pease v. Hirst, 10 Barn. & C. 122; Freeman v. Perry, 22 Conn. 617; Newman v. Ravenscroft, 67 Ill. 496; Woodbury v. Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Lewis v. Hathman, 7 Ind. 585; Titcomb v. Thomas, 5 Greenl. (Me.) 282; Pease v. Dwight, 6 How. 190, 12 L. Ed. 399. See N. I. L. § 30; R. J. & B. F. Camp Lumber Co. v. State Sav. Bank, 59 Fla. 455, 51 South. 543.

Following Tenor of Instrument

The tenor of a bill or note has already been explained, under § 43. The same reasons require that the indorsement follow the tenor of the original instrument that require that the acceptance follow it. The indorser, as well as the acceptor, may not alter the amount of money⁸² obligated in the instrument to be paid, nor the time,⁸³ place, or manner of payment. If, for instance, the indorser ordered payment of part of the sum called for in the original instrument to one person, and part to another, it would amount to an apportionment of the contract, and the acceptor or maker would thus, by the terms of the original contract, be liable to two actions where, by the terms of the original contract, he was liable to but one.⁸⁴ Were the rule otherwise, the indorser would be empowered to make a contract for the maker or acceptor without his assent,—a *reductio ad absurdum*. But this does not mean that, when an instrument has been paid in part, a receipt for the amount paid may not be written on its back, and the indorser may not transfer the balance,⁸⁵ nor that a note may not be transferred to two or more persons, who hold it in co-ownership as a joint right,⁸⁶ nor that an instrument may not be indorsed to a third person as collateral security for a claim equaling but part of the amount

⁸² N. I. L. § 32; *Hawkins v. Cardy*, 1 Ld. Raym. 360. In this case it was shown that Cardy drew a bill for £46. 19s., payable to B. or order, and that B. indorsed £43. 4s. of it payable to plaintiff. It was held by the court that the note was such a personal contract as not to be capable of apportionment. *Planters' Bank of Tennessee v. Evans*, 36 Tex. 592.

⁸³ In *Smallwood v. Vernon*, 1 Strange, 478, it was held that an indorser might charge himself to pay at a different time from that specified in the note, though he could not lay a charge upon the maker of a note, differing from the terms of such note. If a note were payable May 1st and it was indorsed payable April 1st, this would make it a promissory note payable, as to the indorser, April 1st.

⁸⁴ *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637; *Hughes v. Kiddell*, 2 Bay (S. C.) 324.

⁸⁵ N. I. L. § 32 (last sentence); *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637.

⁸⁶ *Flint v. Flint*, 6 Allen (Mass.) 36, 83 Am. Dec. 615; *Conover v. Earl*, 26 Iowa, 167. See N. I. L. § 41.

called for in the instrument itself.⁹⁷ All these are perfectly proper courses, because they transfer but one right of action. The test is, does the transfer cut up the right of action, or vary it, or invest different persons with different rights of action against different parties to the instrument? If it does, the indorsement is void as such.

It is sometimes argued that a writing on the back of the instrument, in the form of words of a guaranty, corresponds to and follows the tenor and purpose of the instrument, and that for this reason it is a form of indorsement. But the better opinion is that its legal effect is what it purports to be—a form of a special contract. A guaranty in general terms, such as "I warrant the collection of the within note, for value received," is not an indorsement.⁹⁸ Whether a guaranty on a negotiable bill or note is itself negotiable is a question concerning which there is much confusion.⁹⁹ On the one hand it is held by some cases that the guaranty does not fall within the rule of negotiability, and can inure only to the benefit of the person to whom it was given.¹ On the other hand it is held in some jurisdictions that the guaranty passes with the instrument, and inures to the benefit of the holder.² In this view, in states where choses in action are assignable, suit may be brought by the holder upon the guaranty in his own name.³ But, even where the latter rule prevails, it cannot be said that the guaranty is strictly "negotiable," inasmuch as only the rights of the party to whom the guaranty was given can pass to subse-

⁹⁷ Reid v. Furnival, 5 Car. & P. 499. See N. I. L. § 27.

⁹⁸ Ante, p. 153, note 15.

⁹⁹ Daniel, Neg. Inst. §§ 1774-1778; Rand. Com. Paper. §§ 860, 861.

¹ True v. Fuller, 21 Pick. (Mass.) 140; Tinker v. McCauley, 3 Mich. 188; McDoal v. Yeomans, 8 Watts (Pa.) 361; Irish v. Cutter, 31 Me. 536; Hayden v. Weldon, 43 N. J. Law, 128, 39 Am. Rep. 551. See Pars. Notes & B. 133, 134.

² Webster v. Cobb, 17 Ill. 466; Phelps v. Church, 65 Mich. 232, 32 N. W. 30; Story, Bills, § 458.

³ Cooper v. Dedrick, 22 Barb. (N. Y.) 516; Cole v. Merchants' Bank of Watertown, N. Y., 60 Ind. 350; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Phelps v. Sargent, 69 Minn. 118, 71 N. W. 927.

quent holders, and it would still be subject to defenses existing between the original parties.⁴

Who may Indorse

The requisite of an indorsement next in importance to its being according to the tenor of the instrument is that it be by the payee or a subsequent holder.⁵ As we shall see, however, in the next section, a person who is not a holder or owner of the instrument in any sense, but who puts his name upon it merely to support its circulation by his credit,

⁴ *Gallagher v. White*, 31 Barb. (N. Y.) 92; *Omaha Nat. Bank v. Walker* (C. C.) 5 Fed. 399; *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582; 2 Ames Cas. Bills & N. 225, note 1; Rand. Com. Paper, § 861. See *CENTRAL TRUST CO. v. FIRST NAT. BANK*, 101 U. S. 70, 25 L. Ed. 878; *Moore Cases Bills and Notes*, 110; *Webster v. Cobb*, 17 Ill. 466, contra.

⁵ *Scotland County Nat. Bank v. Hohn*, 146 Mo. App. 699, 125 S. W. 539 (N. I. L.). An apparent exception exists in the case of an instrument drawn or indorsed to the order of a person as "cashier" of a bank. *Ante*, p. 84, note 45. In such case either the bank or corporation or the officer may indorse. *First Nat. Bank of Angelica v. Hall*, 44 N. Y. 395, 4 Am. Rep. 698; *Folger v. Chase*, 18 Pick. (Mass.) 63; *Baldwin v. Bank of Newbury*, 1 Wall. 239, 17 L. Ed. 534. N. I. L. § 42, makes the rule applicable to a "cashier or other fiscal officer of a bank or corporation." See N. I. L. § 18; *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193 (N. I. L.); *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731, 112 N. W. 185 (N. I. L.). As to indorsement by a payee or indorsee whose name is misspelled or wrongly designated, see N. I. L. § 43; *First Nat. Bank v. McNairy*, 122 Minn. 215, 142 N. W. 139. "Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others." N. I. L. § 41; *First Nat. Bank of City of Brooklyn v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.); *Market & Fulton Nat. Bank v. Ettenson's Estate*, 172 Mo. App. 404, 158 S. W. 448 (N. I. L.). This states the common law rule; *Kaufman v. State Sav. Bank*, 151 Mich. 65, 114 N. W. 863, 18 L. R. A. (N. S.) 630, 123 Am. St. Rep. 259. If one undertakes to indorse, he transfers only his interest by way of equitable assignment. *Carwick v. Vickery*, 2 Doug. 653; *Smith v. Whiting*, 9 Mass. 334; *Dwight v. Pease*, 3 McLean, 94, Fed. Cas. No. 4,217; *Daniel, Neg. Inst.* §§ 684, 701a. An instrument payable to A. or B. is not within section 41, N. I. L. *Union Bank of Bridgewater v. Spies*, 151 Iowa, 178, 130 N. W. 928 (N. I. L.); *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247 (N. I. L.); *Voris v. Schoonover*, 91 Kan. 530, 138 Pac. 607 (N. I. L.).

may incur liability as a so-called "irregular indorser." This is because of several reasons. The first is that the property of the instrument is in the payee.⁶ Until he indorses it, the legal title is not transferred.⁷ Mere possession by some one else of the instrument unindorsed does not entitle that other person to the full rights of a bona fide purchaser, and if the maker or acceptor pays it to such person, it is at the risk of possible re-payment.⁸ But this rule is not universal in its application. An indorsement is only necessary to transfer the legal as distinguished from the equitable title to the paper. If by mistake, accident, or fraud, the indorsement has been omitted, when it was intended that the indorsement should be made, the payee may be compelled by a court of equity to make the indorsement. Meantime the transferee holds the bill or note under the same rights that he would have acquired under the assignment of paper not negotiable. In other words, he is the beneficial owner, and has those rights and only those rights against prior parties which the payee or his assignor might have—and every equitable defense available against them is available against him.⁹ This rule applies to subsequent holders. In cases of

⁶ An infant who is holder or payee of a note or bill may transfer it by indorsement. N. I. L. § 22; *Hardy v. Waters*, 38 Me. 450, Johns. Cas. Bills & N. 152; *Spencer v. Allerton*, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806, Johns. Cas. Bills & N. 120; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100, Johns. Cas. Bills & N. 126. See p. 90, note 72, *supra*.

⁷ *Ellis v. Brown*, 6 Barb. (N. Y.) 282.

⁸ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502.

⁹ *Harrop v. Fisher*, 9 Wkly. Rep. 667, 10 C. B. (N. S.) 196; *Hedges v. Sealy*, 9 Barb. (N. Y.) 214; *Freund v. Importers' & Traders' Nat. Bank*, 6 Thomp. & C. (N. Y.) 236; *Woodworth v. Huntoon*, 40 Ill. 131, 89 Am. Dec. 340, Johns. Cas. Bills & N. 150; *Minor v. Bewick*, 55 Mich. 491, 22 N. W. 12. Subsequent indorsement does not place him in a better position in this respect if after maturity, or if he had in the meantime acquired notice of existing equities. *Whistler v. Forster*, 14 C. B. (N. S.) 248; *Osgood's Adm'r's v. Artt* (C. C.) 17 Fed. 575. N. I. L. § 49, provides that in cases of transfer without indorsement "the transfer vests in the transferee such title as the transferror had therein and the transferee acquires, in addition, the right to have the indorsement of the transferror." "It establishes the equitable rule as the rule at law." *Huffcut, Neg. Inst.* (1st Ed.) 26.

indorsements in full, the indorsee in such indorsement named must for the same reasons himself indorse the instrument. In no other way will the transfer convey the legal title to the holder, so that he can at law hold the other parties liable to him. The second reason rests upon the theory that the liability of indorsers to each other is regulated by the order of their indorsements. This reason also is restricted in its application. To this rule, too, the irregular indorser, who has not owned the paper, and to whom no such transfer has been made, is also an exception;¹⁰ although, of course, where the second accommodation indorser of an instrument has paid and taken it up, he becomes a holder for value, and may compel the first accommodation indorser to pay him, although both are accommodation indorsers.¹¹ But, leaving aside the doctrine of irregular indorsements, the contract which each indorser makes when he indorses the paper is that he is liable to every subsequent indorsee, just as every antecedent party is liable to him. The liability is several. It is successive. And the object of the rule is only to maintain these indorsements in the regular order of their liability. It does not go further than this. Thus where¹² A. made a note payable to B. or order, and B. afterwards indorsed the note to C., who afterwards indorsed it to B. again, the court, upon suit by B. against C., refused a recovery because it was a prior indorser calling upon a subsequent one; and the inference of the decision is that this course was not allowed because it involved circuity of action. One who has indorsed a bill or note, and become liable as indorser, cannot, as a rule, on having the instrument reindorsed to him by the other, bring an action against him on the indorsement, for the intermediate indorsee would have his remedy over, and the result of the action would be to place the parties in precisely the same situa-

¹⁰ Easterly v. Barber, 66 N. Y. 433; Greusel v. Hubbard, 51 Mich. 95, 16 N. W. 248, 47 Am. Rep. 549; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49.

¹¹ Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109; Holloway v. Quinn, 18 Wkly. Notes Cas. 284.

¹² Bishop v. Hayward, 4 Term R. 470.

tion as before any action at all.¹⁸ But if such prior indorser had indorsed without recourse, or if the circumstances otherwise negatived the right of his intermediate indorsee to sue upon the indorsement, the objection as to circuity of action would be removed, and the prior indorser could recover under the indorsement back as indorsee.¹⁹

Necessity for Delivery

As in the case of the inception of the original contract rights under the principal terms of the instrument, an indorsement requires delivery.²⁰ And the rules and reasons relating to the delivery of an indorsed instrument by the payee or indorser are in most respects the same as those already given relating to the delivery of bills and notes. The negotiation of the instrument begins with the act of indorsement as distinguished from the intention of the parties to indorse²¹ and is consummated by the delivery of the instrument.²² On these simple acts the whole contract

¹⁸ N. I. L. § 50.

¹⁹ In *Wilders v. Stevens*, a bill was drawn by plaintiffs to their order, on J. H., and it was then indorsed by plaintiffs to defendant and by defendant to plaintiffs. It was claimed that circuity of action would arise from such indorsement. It was shown in the pleading that the indorsement by the defendant was to make him liable as surety, and the court held that inasmuch as the defendant could not sue the plaintiff, the objection as to circuity being removed, the plaintiffs might recover from the defendant. 15 Mees. & W. 208. See *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326; *Rand. Com. Paper*, § 719.

²⁰ *Spencer v. Carstarphen*, 15 Colo. 445, 24 Pac. 882, Johns. Cas. Bills & N. 117; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Richards v. Darst*, 51 Ill. 140; *Badgley v. Votrain*, 68 Ill. 25, 18 Am. Rep. 541; *Kyle v. Thompson*, 2 Scam. (Ill.) 432. "Indorsement" means an indorsement completed by delivery." N. I. L. § 191.

²¹ *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 18 Am. St. Rep. 765.

²² N. I. L. § 18. See page 96, supra. In the case of *Marston v. Allen*, 8 Mees. & W. 494, one Harrop, a bank accountant, drew a bill payable to himself upon defendant, who was indebted to the bank, which was accepted by defendant. The bill was signed on the back by Harrop and given to W. Marston, another employé, to keep for the bank. It was testified by E. Marston that he received this bill, for value, from W. Marston, and that he had indorsed and delivered it for value to the plaintiff. It was held that the indorsement and

rests. The law *prima facie* presumes the other elements of contract. For example, delivery once being made and the title having once passed, these facts of themselves import a consideration.¹⁸ And the term "indorsed" in pleading includes delivery for value to the indorsee.¹⁹ But both indorsement and delivery must concur in the transfer.²⁰ The indorsement without delivery is nothing, although the indorser has in fact signed his name and the indorsee knows that it is signed. Still the contract so far as it has gone may be revoked by the indorser, and the indorsement countermanded,²¹ unless some contract right other than

delivery of the bill to W. Marston was not to him as indorsee, and was consequently not such indorsement as to transfer the bill. In Adams v. Jones, a bill drawn on and accepted by defendant was indorsed in blank by J. F. and delivered to plaintiff to deliver to R. The defendant, being acceptor, was notified by R. not to pay to plaintiff, and refused payment. On the action in assumpsit being brought, it was held that plaintiff had no title to sue, but that he held the bill only as the agent of R. 12 Adol. & E. 455. Cartwright v. Williams, 2 Starkie, 340; Frederick v. Winans, 51 Wis. 472, 8 N. W. 301; Higgins v. Bullock, 66 Ill. 37; Freeman's Bank v. Ruckman, 16 Grat. (Va.) 129; Dann v. Norris, 24 Conn. 333.

¹⁸ HOOK v. PRATT, 78 N. Y. 371, 34 Am. Rep. 539, Moore Cases Bills and Notes, 121; Durham v. Manrow, 2 N. Y. 533; Keteltas v. Myers, 19 N. Y. 231; Russell v. Whipple, 2 Cow. (N. Y.) 536; Chappell v. Bissell, 10 How. Prac. (N. Y.) 274; Marshall v. Rockwood, 12 How. Prac. (N. Y.) 452.

¹⁹ Trask v. Karrick (Vt.) 89 Atl. 472. See N. I. L. § 191; Louisville Coal Min. Co. v. International Trust Co., 18 Colo. App. 345, 71 Pac. 898 (N. I. L.).

²⁰ In Buckley v. Hann, the action was upon a bill drawn by W. and indorsed to plaintiff, and it was shown that the bill was drawn and accepted and W.'s name signed upon it, and that it was then by messenger sent to plaintiff, who lived some distance from London, W.'s residence. Under the statute requiring that the whole cause of action must arise in the city, it was held that the action could not be maintained, since indorsement was inoperative without delivery. 5 Exch. 43.

²¹ Thus, in the case of Brind v. Hampshire, one Usher indorsed a bill, payable to himself, to the order of B., and gave it to the defendant to deliver to B. Before this had been done, Usher directed defendant not to deliver the bill. B., knowing the facts, brought action in trover to recover the bill. It was held that the indorsement without delivery was insufficient to give B. the right to main-

that of the indorsement itself exists in the indorsee. The delivery must be by the indorser, otherwise the transfer of the instrument is not by his order. His executor or administrator even cannot make delivery, although the payee before his decease has written his name upon it.²²

IRREGULAR INDORSEMENTS

67. A person who signs his name in blank on a bill or note payable to the order of the maker or drawer, or payable to bearer, before its delivery by the maker or drawer, is deemed an indorser.
68. Where a person signs his name in blank on a bill or note payable to the order of a person other than the maker or drawer, before its delivery to the payee, different rules prevail in different jurisdictions in which the Negotiable Instruments Law has not been adopted as to his liability.
 - (a) In some jurisdictions he is *prima facie* presumed to assume no liability to the payee, and to be a second indorser; but this presumption may be rebutted by showing that the indorsement was made to give the maker credit with the payee, and the irregular indorser then becomes liable as first indorser, upon the theory that the payee may indorse to him without recourse, and fill up the blank indorsement of the irregular indorser to himself.
 - (b) In other jurisdictions he is presumed to be a joint maker.
 - (c) In other jurisdictions he is presumed to be a guarantor.
 - (d) In other jurisdictions he is presumed to be an indorser.
 - (e) In other jurisdictions his liability is regulated by statute.

tain the action. There was no binding obligation between plaintiff and defendant, merely an inchoate contract. 1 Mees. & W. 365.

²² *Bromage v. Lloyd*, 1 Exch. 32; *Marston v. Allen*, 8 Mees. & W. 494.

68a. In jurisdictions where the Negotiable Instruments Law has been adopted, the law has been codified as follows:

§ 64: Where a person not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

If an instrument is payable to bearer, or to the order of the maker or drawer, a person not otherwise a party to the instrument, who before delivery signs his name in blank upon it, is deemed to be an indorser. In such case, upon the inception of the bill or note as an obligation, by its delivery or its indorsement by the maker or drawer, the name of the indorser appears in its regular place upon the instrument, and is treated, as in fact it appears to be, as if it had been made by one to whom the instrument had been delivered, and who, before himself transferring it by delivery, had indorsed it in order to incur the liability of indorser to his transferee and subsequent holders. The effect of the indorsement cannot be varied by parol proof.²⁸

²⁸ Thacher v. Stevens, 46 Conn. 561, 33 Am. Rep. 39; Hately v. Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304; Armstrong v. Harshman, 61 Ind. 52, 28 Am. Rep. 665; Bigelow v. Colton, 13 Gray (Mass.) 309, 74 Am. Dec. 633; Dubois v. Mason, 127 Mass. 37, 34 Am. Rep. 335; First Nat. Bank of St. Charles v. Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 502; Heath v. Van Cott, 9 Wis. 516; Daniel, Neg. Inst. § 707a. N. I. L. § 64, subd. 2, enacts: "If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he [the irregular indorser] is liable to all parties subsequent to the maker or drawer." See H. & C. Newman v.

Where, however, an instrument bearing upon its back the signature of a person not otherwise a party is payable to the order of a specific payee, who is not the maker or drawer, a different question arises. On the one hand we are met with the objections that no one but the payee or a subsequent holder can be an indorser, and that the contract actually intended is not expressed. On the other hand it is obvious that the irregular indorser intended to assume liability in favor of the payee. Different courts have determined the nature of this liability in different ways, and the decisions of the courts of the various states are in hopeless conflict.

In New York, and in some other jurisdictions, a curious device has been adopted for carrying into effect the intention of the parties in such cases. The problem was to overcome the legal presumption from the face of the note that such an indorser stood in the position of a subsequent indorser to the payee. So far as the paper showed the record of the transaction, such an indorser could only be presumed to have intended to become liable as second indorser, and could only be regarded as such, and of course not liable upon the instrument to the payee, who was the first indorser. The court, construing the instrument before it, was bound to consider the order of its transfer, as, first, from the maker or drawer to the payee; second, an indorsement by the payee to the irregular indorser as his indorsee; and, lastly, by the irregular indorser to the subsequent indorsee on the paper. Thus, the payee could not hold such an indorser liable because he was, so far as the paper showed, his indorser.²⁴ But the courts soon saw that carrying this

Pellerin, 128 La. 449, 54 South. 938 (N. I. L.). If one indorses for the accommodation of the payee, after delivery to the payee, he is a regular indorser and liable as such. *Pierce v. Mann*, 34 Mass. (17 Pick.) 244. Section 64, N. I. L., has no application to such a case. *Kohn v. Consolidated Butter & Egg Co.*, 30 Misc. Rep. 725, 63 N. Y. Supp. 265 (N. I. L.). See *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136 (N. I. L.).

²⁴ *Herrick v. Carman*, 12 Johns. (N. Y.) 159; *Tillman v. Wheeler*, 17 Johns. (N. Y.) 326; *Bacon v. Burnham*, 37 N. Y. 614; *PHELPS v. VISCHER*, 50 N. Y. 69, 10 Am. Rep. 433, *Moore Cases Bills and Notes*, 123.

doctrine to all lengths would often mean the enforcement of theory at the expense of justice, and of defeating the intent of the parties. The purpose of the irregular or anomalous indorser in making the indorsement, and of the payee in receiving the instrument with such an indorsement, was to obligate the former to the latter. The payee took the instrument for value because the indorser's name was there. Hence in such cases the rule was relaxed. The paper itself was held to furnish only *prima facie* evidence of this intention. It was competent to rebut this presumption by parol proof that the indorsement was made to give the maker credit with the payee. To meet the objection that the payee, in order to complete the chain of transfer, must needs be the first indorser, the payee, as holder, was permitted to indorse the instrument to the accommodation indorser without recourse, and to fill up the blank indorsement of the accommodation indorser to himself. In this way the parties were placed in the same position as if the maker had in the first instance delivered the note to the payee, the payee had then indorsed it without recourse to the accommodation indorser, and the accommodation indorser had then indorsed it to the payee. This, moreover, could be done at any time—on the trial, or even, if omitted then, on an appeal. The practical effect of this course was to obviate the difficulty raised by the other rule we have just mentioned—that, where an instrument came into the hands of a person who already appeared upon it as a payee, he could not maintain an action against any of the parties whose indorsements were subsequent to the first appearance of his name, because each of these persons, on paying him the note, would have an immediate right to demand payment from him on his earlier indorsement. The law in such case, to avoid this circuituity, denied him the right of action. But, by the intervention of this device, this defense of circuituity was not available against him, because the irregular or anomalous indorser, under his agreement of indemnity with the payee, could have no right of action against the payee,

and, the reason failing, the rule itself fell to the ground.²⁵ It is important to notice that it is incumbent on the payee suing the indorser to show that such indorsement was made by the indorser to give credit to the note, and was taken by him because of such credit. He cannot be silent upon this point, and avail himself of the rule, for the presumption is that such an indorser is a second indorser, and not liable to the payee. The burden is upon the payee to show that, by agreement between the parties, the liability is otherwise.²⁶

But these reasons and rules do not prevail throughout the Union; nor do they prevail in England. In the rule just set forth the plain effect of the writing was overcome and contradicted by parol evidence. And many of the courts have not seen fit to flatly defy this rule of evidence. These courts have sought either to distinguish and make the case an exception to this rule of evidence, or to carry out the intention of the parties in other ways. In distinguishing the rule they have made a difference in its application to immediate and to remote parties. Between immediate parties it was thought that the indorsement in blank implied an authority to write over it anything that was in fact agreed upon by the parties. It was therefore perfectly competent both to show by parol evidence what this

²⁵ Hall v. Newcomb, 8 Hill (N. Y.) 233, s. c. in error 7 Hill (N. Y.) 416, 42 Am. Dec. 82. In this case a promissory note payable to H. was made by F. This was indorsed in blank by N. for the accommodation of F., and knowing that it was the intention of F. to obtain money from H. upon it. H. took the note and supplied the amount desired. N. was held not to be liable to H. as maker or guarantor, but to be liable as an indorser only. Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326; Coulter v. Richmond, 59 N. Y. 478; Jaffray v. Brown, 74 N. Y. 393; Kamm v. Holland, 2 Or. 59; Wade v. Creighton, 25 Or. 455, 36 Pac. 289; Cady v. Shepard, 12 Wis. 639; Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105. With the exception noted in the next note, the N. I. L. adopts the result reached by these cases and holds the irregular indorser liable to the payee. Section 64, subd. 1.

²⁶ Under N. I. L. § 64, no such burden rests upon the payee. He establishes, at least presumptively, the liability of the defendant as indorser by proving the latter's irregular indorsement. FAR ROCK-AWAY BANK v. NORTON, 186 N. Y. 484, 79 N. E. 709, Moore Cases Bills and Notes, 127 (N. I. L.).

agreement was, and also, such agreement being shown, for the courts to carry it into effect. If the agreement was to indorse, then the writing of the name was to be an indorsement,²⁷ if to guaranty, then the writing was to be a guaranty;²⁸ and so likewise in cases of surety or joint maker.²⁹ But in case of remote parties, the same reason could not obtain. Between them there can be no mutual understanding, and therefore this rule, so far as showing by the words or acts of the parties what was meant by the writing, was rejected.³⁰ The courts then fell back upon the principle that the signature of the irregular indorser must have meant something, and that they would support his act as a contract of some sort, rather than let it fail as a void obligation. This has given rise to a chaos of conflicting authorities, but from out of it the following rules have been classified:³¹ In some jurisdictions, for the reason that the irregular indorser is not the payee or legal holder and hence cannot be deemed an indorser, it is held that he is presumptively a joint maker.³² This rule prevails per-

²⁷ Eberhart v. Page, 89 Ill. 550; Mammon v. Hartman, 51 Mo. 169.

²⁸ Camden v. McKoy, 3 Scam. (Ill.) 437, 38 Am. Dec. 91; Bates v. Worthington, 163 Ill. App. 75; Taylor v. French, 2 Lea (Tenn.) 260, 31 Am. Rep. 609.

²⁹ Rey v. Simpson, 22 How. 341, 16 L. Ed. 280; Walz v. Alback, 37 Md. 404.

³⁰ Houston v. Bruner, 39 Ind. 383; Whitehouse v. Hanson, 42 N. H. 18.

³¹ Cromwell v. Hewitt, 40 N. Y. 491, note, p. 492, 100 Am. Dec. 527. The student is referred to this note, and also to the note of Prof. Ames (volume 1, p. 289) to Boynton v. Pierce, 79 Ill. 145, for a large number of collated cases, which are the authority for the above statement. See, also, Huffcut, Neg. Inst. (1st Ed.) 479, note 1; Daniel, Neg. Inst. §§ 707, 716.

³² Scanland v. Porter, 64 Ark. 470, 42 S. W. 897; Schroeder v. Turner, 68 Md. 508, 13 Atl. 331; Phoenix Cotton Mfg. Co. v. Fuller, 3 Allen (Mass.) 441; President, etc., of Union Bank of Weymouth & Braintree v. Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; Way v. Butterworth, 108 Mass. 509; Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671; Gumz v. Giegling, 108 Mich. 296, 66 N. W. 48; Robinson v. Bartlett, 11 Minn. 410 (Gil. 302); Schultz v. Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373 (N. I. L.); Mercantile Bank of Memphis v. Busby, 120 Tenn. 652, 113 S. W. 390 (N. I. L.), semble; E. L. Walsh Co. v.

haps more widely than any other, though in states where it prevails the courts differ as to whether the presumption is conclusive or merely *prima facie*, and open to rebuttal. In other jurisdictions, while the considerations just stated have withheld the courts from treating the irregular indorser as in law an indorser, the anomalous position of the signature upon the back of the instrument has also withheld them from treating him as a maker, and they have held that he was to be presumed to be a guarantor.⁸³ Nor does this exhaust the catalogue of the different liabilities which different courts have spelled out of the anomalous indorsement. In England it seems that the anomalous indorser is not liable at all.⁸⁴ It is impossible in a work of this character to discuss at length the reasons for these various conflicting rules, or their qualifications, for they have been only broadly stated. The student must fix in his mind the general classification, and should consult in detail the authorities in his particular state.

An important step towards uniformity on this subject has already been attained by the adoption in most states of the Negotiable Instruments Law, which provides: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the

Gillett, 146 Wis. 61, 130 N. W. 879, the note in question being governed by Minnesota law; *Pharr v. Stevens*, 124 Tenn. 669, 139 S. W. 730 (N. I. L.), *semble*; *Downey v. O'Keefe*, 26 R. I. 571, 59 Atl. 929, 30 L. R. A. 513 (N. I. L.), *semble*; *Phipps v. Harding*, 17 C. C. A. 203, 70 Fed. 468. But see *Sweetser v. Jordan*, 211 Mass. 393, 97 N. E. 768.

⁸³ *Carroll v. Weld*, 13 Ill. 682, 56 Am. Dec. 481; *Boynton v. Pierce*, 79 Ill. 145; *Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; *Firman v. Blood*, 2 Kan. 496; *Lank v. Morrison*, 44 Kan. 594, 24 Pac. 1106; *Arnold v. Bryant*, 8 Bush (Ky.) 668 (Kentucky statute); *Lyon, Potter & Co. v. First Nat. Bank*, 29 C. C. A. 45, 85 Fed. 120 (Iowa statute).

⁸⁴ 2 Ames, *Bills & N. p.* 839, citing *Lecaan v. Kirkman*, 6 Jur. (N. S.) 17; *Steele v. McKinlay*, 5 App. Cas. 754; *Jenkins v. Coomber*, [1898] 2 Q. B. 168 (B. E. A.); *Gwynnill v. Herbert*, 5 Adol. & E. 436. But see *Penny v. Innes*, 1 C. M. & B. 439; *Matthews v. Bloxsome*, 33 L. J. R. 209. Under the B. E. A. an irregular indorser is liable as an indorser to the payee. *Glenie v. Bruce Smith*, [1908] 1 K. B. 263. See the note following.

instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." ⁸⁵ This enactment has the further advantage

⁸⁵ N. I. L. §§ 63, 64. See *Pharr v. Stevens* (Tenn.) 139 S. W. 730 (N. I. L.); *Re Alldred's Estate*, 229 Pa. 627, 79 Atl. 141 (N. I. L.); *Lyons Lumber Co. v. Stewart*, 147 Ky. 653, 145 S. W. 376 (N. I. L.); *Mackintosh v. Gibbs*, 79 N. J. Law, 40, 74 Atl. 708 (N. I. L.); *Roessle v. Lancaster*, 130 App. Div. 1, 114 N. Y. Supp. 387 (N. I. L.); *Bronx Borough Bank v. Garman* (Sup.) 135 N. Y. Supp. 10 (N. I. L.); *Edward Knapp & Co. v. Tidewater Coal Co.*, 85 Conn. 147, 81 Atl. 1063 (N. I. L.); *Bank of Montpelier v. Montpelier Lumber Co.*, 16 Idaho, 730, 102 Pac. 685 (N. I. L.). Since under these sections the irregular indorsee is liable as an indorser, he is liable only on due presentation and notice of dishonor. *Deahy v. Choquet*, 28 R. I. 388, 67 Atl. 421, 14 L. R. A. (N. S.) 847 (N. I. L.); *A. B. Farquhar Co. v. Highan*, 16 N. D. 106, 112 N. W. 557 (N. I. L.); *Peck v. Easton*, 74 Conn. 456, 51 Atl. 134 (N. I. L.); *Hackley State Bank v. Magee*, 55 South, 656, 128 La. 1008 (N. I. L.); *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592 (N. I. L.); *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455 (N. I. L.); *Kohn v. Consolidated Butter & Egg Co.*, 30 Misc. Rep. 725, 63 N. Y. Supp. 265 (N. I. L.); *Perry Co. v. Taylor Bros.*, 148 N. C. 362, 62 S. E. 423 (N. I. L.), distinguishing *Rouse v. Wooten*, 140 N. C. 558, 63 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280 (N. I. L.); *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842 (N. I. L.); *Re Swift (D. C.) 106 Fed. 65 (N. I. L.)*; *McDonald v. Luckenbach*, 170 Fed. 434, 95 C. C. A. 60 (N. I. L.); *Mechanics' & Farmers' Sav. Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439 (N. I. L.); *First Nat. Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790; s. c. 154 Ky. 11, 156 S. W. 856 (N. I. L.); *Gibbs v. Guaraglia*, 75 N. J. Law, 168, 67 Atl. 81 (N. I. L.). See dissenting opinion in *Hibernia Bank & Trust Co. v. Dresser*, 132 La. 532, 61 South. 561 (N. I. L.); *Continental Bank & Trust Co. v. Baker*, 132 La. 544, 61 South. 575. See, also, *Hunter v. Harris*, 63 Or. 505, 127 Pac. 786.

The irregular indorser of a note for the accommodation of the maker-payee is liable under subdivision 2, § 64, N. I. L., to the indorsee. *Yonkers Nat. Bank v. Mitchell*, 156 App. Div. 318, 141 N. Y. Supp. 128 (N. I. L.). It has also been held that an irregular indorser for the accommodation of the acceptor is liable to the drawer-payee notwithstanding subdivision 2 of section 64. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N.

that it abolishes so-called "presumptions," and lays down definite rules of liability,⁸⁶ and that it probably gives expression as nearly as possible to the actual intention of the parties in such cases.

S.) 136. The interpretation of the New York court would seem to be more in accordance with the spirit and purpose of the act than with its express provisions. See section 64 (subd. 2). See Brannan, Anno. N. I. L. (2nd Ed.) p. 78. The result is contrary to that reached at common law in England. Steele v. McKinlay, 5 App. Cas. 754. See the preceding note. After the passage of the B. E. A. the Court of Queen's Bench held that the rule of Steele v. McKinlay was not altered by section 56 (which corresponds to section 63, N. I. L.) in Jenkins v. Coomber, [1898] 2 Q. B. 168. Jenkins v. Coomber was in effect overruled by Glenie v. Bruce Smith, [1908] 1 K. B. 263. The decision in Glenie v. Bruce Smith was much more readily arrived at than that in the Haddock Case, owing to the absence of section 64 (subd. 2) in the English act. See note 36, infra. Perhaps, in analogy to the Haddock Case, one who irregularly indorsed, with intention to obligate himself to the maker-payee, would charge himself accordingly, notwithstanding subdivision 2, § 64. See Conway v. Zender, 154 Wis. 479, 143 N. W. 162 (N. I. L.). See, however, note 23, supra.

Under section 68, N. I. L., irregular indorsers are *prima facie* liable as among themselves in the order in which they indorse. Harris v. Jones, 23 N. D. 488, 136 N. W. 1080 (N. I. L.); Enterprise Brewing Co. v. Canning, 210 Mass. 285, 96 N. E. 673 (N. I. L.); American Trust Co. v. Canevin, 184 Fed. 657, 107 C. C. A. 543 (N. I. L.); George v. Bacon, 138 App. Div. 208, 123 N. Y. Supp. 103 (N. I. L.); Re McCord (D. C.) 174 Fed. 72 (N. I. L.). One who adds to his signature upon a note the word "surety," or an expression of the same meaning, indicates an intention to be pri-

⁸⁶ Baumeister v. Kuntz, 53 Fla. 340, 42 South. 886 (N. I. L.). See, also, Hopkins v. Commercial Bank, 64 Fla. 310, 60 South. 183 (N. I. L.). But see Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136 (N. I. L.); McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000 (N. I. L.), *semble*; Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658 (N. I. L.), *semble*; Kohn v. Consolidated Butter & Egg Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265 (N. I. L.), *semble*; Mercantile Bank of Memphis v. Busby, 120 Tenn. 652, 113 S. W. 390 (N. I. L.); First Nat. Bank v. Bickel, 154 Ky. 11, 158 S. W. 856 (N. I. L.), *semble*; Hunter v. Harris, 63 Or. 505, 127 Pac. 786 (N. I. L.); Germania Nat. Bank v. Mariner, 129 Wis. 544, 548, 109 N. W. 574 (N. I. L.), *semble*, to the effect that section 64 does nothing more than establish presumptions as to the obligation of the irregular indorser.

marily liable as maker, and is therefore not an indorser within section 63, N. I. L., and is not entitled to notice of dishonor. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280 (N. I. L.). See, also, *Pugh v. Sample*, 123 La. 791, 49 South. 526, 39 L. R. A. (N. S.) 834 (N. I. L.). Compare *First Nat. Bank v. Bickel*, 154 Ky. 11, 156 S. W. 856 (N. I. L.). The waiver of presentation and notice by an irregular indorser does not indicate his intention to be bound in any other capacity than indorser. *Hopkins v. Commercial Bank*, 64 Fla. 310, 60 South. 183 (N. I. L.). But "I hereby guarantee payment," written on a note and signed by one not a holder, constitutes him a guarantor and not an indorser. *Noble v. Beeman-Spaulding-Woodward Co.*, 65 Or. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162 (N. I. L.), semble. A potential note given as security, but blank as to date, amount, and time of payment, and irregularly indorsed by the defendant, and not filled up in accordance with the authority given within a reasonable time, is nothing more than evidence of an intention to become a surety. *Union Trust Co. of New Jersey v. McCrum*, 145 App. Div. 409, 129 N. Y. Supp. 1078 (N. I. L.). An irregular indorser is not discharged by the discharge of the maker under the bankruptcy act, if the necessary proceedings on dishonor are duly taken, although the plaintiff was a creditor assenting to a composition under the act. *Easton Furniture Mfg. Co. v. Caminez*, 146 App. Div. 436, 131 N. Y. Supp. 157, rehearing and appeal to Court of Appeals denied 147 App. Div. 904, 131 N. Y. Supp. 1112 (N. I. L.). Nor does a deposit of corporate stock to secure a number of notes discharge an indorser on one of them. *Smith v. Ettenberg*, 75 Misc. Rep. 458, 133 N. Y. Supp. 463 (N. I. L.). See, also, *Rosenberg v. Schoenwald* (Sup.) 126 N. Y. Supp. 615 (N. I. L.); *Dumbrow v. Gelb*, 72 Misc. Rep. 400, 130 N. Y. Supp. 182 (N. I. L.). So the maker need not be prosecuted to insolvency in order to hold an indorser. *Williams v. Paintsville Nat. Bank*, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350 (N. I. L.).

An irregular indorser's contract under the N. I. L. is not within the statute of frauds because of its character as a commercial indorsement. *W. H. Carsey & Co. v. Swan & James*, 150 Ky. 473, 150 S. W. 534 (N. I. L.). But giving time to, or rehearing, the principal debtor discharges an irregular indorser. *Northern State Bank of Grand Forks v. Bellamy*, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149 (N. I. L.), semble, unless he consents, *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N. E. 982 (N. I. L.). A partner irregularly indorsing in his individual capacity a note of the firm of which he is a member incurs an individual liability as indorser in addition to his distinct liability as maker, and he may be sued either as indorser or maker. He is a person not otherwise a party to the instrument. *National Exch. Bank v. Lubrano*, 29 R. I. 64, 68 Atl. 944 (N. I. L.); *International Trust Co. v. Caroline*, 78 Misc. Rep. 179, 137 N. Y. Supp. 932 (N. I. L.), semble; *Fourth Nat. Bank v. Mead*, 216 Mass. 521, 104 N. E. 377 (N. I. L.). See, also, *First Nat.*

Bank v. Sandmeyer, 164 Ill. App. 98 (N. I. L.); **Conway v. Zender**, 154 Wis. 479, 143 N. W. 162 (N. I. L.). That indorsers on a note made their indorsements in consequence of unlawful inducements held out to them by the maker, for which the payee was not responsible, did not preclude the payee from recovering from the irregular indorsers. **Ford v. Shapiro**, 207 Mass. 108, 92 N. E. 1029 (N. I. L.).

An irregular indorser, who signs for the accommodation of the maker may on taking up the note sue the maker on the note. **Heaton v. Dickson**, 153 Mo. App. 312, 183 S. W. 159. An accommodation maker has, however, no action on the note against the accommodated payee, but must sue for indemnity. **Morgan v. Thompson**, 72 N. J. Law, 244, 62 Atl. 410 (N. I. L.). Where the first of two irregular indorsers took up the note, his action against the second was held to be for indemnity. **Wilson v. Hendee**, 74 N. J. Law, 640, 66 Atl. 413 (N. I. L.). An irregular indorser indorsed for the accommodation of the maker. His action on the note was barred by the statute of limitations. But it was held that he nevertheless had an action for indemnity against the maker. **Blanchard v. Blanchard**, 201 N. Y. 134, 94 N. E. 630, 37 L. R. A. (N. S.) 783 (N. I. L.). The irregular indorser, unlike the ordinary indorser, has no power under section 121, N. I. L., to reissue the instrument after taking it up. **Quimby v. Varnum**, 190 Mass. 211, 76 N. E. 671 (N. I. L.). The same defenses as to legality of consideration are available to an irregular indorser under these sections as to the maker for whose accommodation he signed. **Leonard v. Draper**, 187 Mass. 536, 73 N. E. 644 (N. I. L.), semble; **Willard v. Crook**, 21 App. D. C. 238 (1903). Compare **Packard v. Windholz**, 88 App. Div. 365, 84 N. Y. Supp. 666, affirmed 180 N. Y. 549, 73 N. E. 1129 (1905). The liability of irregular indorsers had been the subject of legislation in various states prior to the adoption of the N. I. L. See **Daniel, Neg. Inst.** § 714; **Rand. Com. Paper**, §§ 831, 836, 838, 839, 844.

CHAPTER V

OF THE NATURE OF THE LIABILITIES OF THE PARTIES

69. Acceptor and Maker.
70. Facts Which the Acceptor Admits.
71. Facts Which the Acceptor does not Admit.
- 72-73. Acceptor Supra Protest.
- 73a-76. Drawer and Indorser.
 77. Undertaking of Drawer.
 78. Warranties of Indorser.
 79. Warranties of Indorser without Recourse—Of Transferror by Delivery.
 80. Damages against the Acceptor, Maker, Drawer, and Indorsers upon the Bill or Note and upon the Warranties.
- 81-83. Accommodation Parties and Persons Accommodated.
- 83a-83b. Conflict of Laws.

ACCEPTOR AND MAKER

69. The acceptor and maker each promises the payee and subsequent holders that he will pay the bill or note according to its tenor at the time of signing.¹

¹ N. I. L. §§ 60, 62. N. I. L. § 70, provides: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." This declares the law as laid down in this country. In England there was formerly great diversity of opinion as to the necessity of presentment to charge the acceptor when a bill was accepted payable at a particular place. It was finally settled by the house of lords (Rowe v. Young, 2 Brod. & B. 165) that, where a bill was so accepted, presentment at the place must be proved. This led to the passage of Onslow's Act (1 & 2 Geo. IV, c. 78), which enacted that an acceptance payable at a particular place should be deemed a general acceptance unless payable there only. The effect of the act was that, except in the latter case, presentment was not necessary to charge the acceptor. Selby v. Eden, 3 Bing. 611; Halstead v. Skelton, 5 Q. B. E. 86. The act did not apply to notes, and, before

Under § 41, we commented upon the shifting relations of the holder with the drawer and the drawee or acceptor of a bill before and after acceptance. And in a later section we shall show that the phrase, "The acceptor of a bill and the maker of a note is the principal debtor thereon," means

and after the act, in case of a note payable at a particular place, presentment has been necessary to charge the maker. *Sanderson v. Bowes*, 14 East, 500; 2 Ames Cas. Bills & N. 93, note 1. Such is the result reached under the Canadian Bills of Exchange Act. *Albert v. Marshall*, 13 East, L. R. 514; *Johnson v. L'Heureux*, 27 West, L. R. 21. In the United States the courts have almost universally held that presentment of a bill or note, although payable at a particular place, is not necessary to charge the acceptor or maker; the only consequence of failure to present being that the acceptor or maker, if he was ready at the time and place, may plead the fact in bar of damages and costs. *Wallace v. McConnell*, 13 Pet. (U. S.) 136, 10 L. Ed. 95; *Cox v. National Bank of New York*, 100 U. S. 704, 25 L. Ed. 739; *Carter v. Smith*, 9 Cush. (Mass.) 321; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Lazier v. Horan*, 55 Iowa, 77, 7 N. W. 457, 39 Am. Rep. 167; *Montgomery v. Tutt*, 11 Cal. 307; *Montgomery v. Elliott*, 6 Ala. 701; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 543, 2 S. E. 888; *FARMERS' NAT. BANK OF ANNAPOLIS v. VENNER*, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690 (N. I. L.), Moore Cases Bills and Notes, 129; *Hyman v. Doyle*, 53 Misc. Rep. 597, 103 N. Y. Supp. 778 (N. I. L.); *Church v. Stevens*, 56 Misc. Rep. 572, 107 N. Y. Supp. 310 (N. I. L.). See *Piper v. Hayward*, 71 Misc. Rep. 41, 127 N. Y. Supp. 240 (N. I. L.). Compare, *YOUNG v. AMERICAN BANK*, 44 Misc. Rep. 308, 89 N. Y. Supp. 915 (N. I. L.), Moore Cases Bills and Notes, 21. In *German American Bank of Rochester v. Milliman*, 31 Misc. Rep. 87, 65 N. Y. Supp. 242 (N. I. L.), the action was by the indorsee against the maker of a note payable at a bank whose banking hours were from 10 a. m. to 4 p. m. During banking hours of the day of maturity presentment was made at the place of payment and payment refused by the bank because it had no funds of the maker. At 3:50 p. m. the maker deposited funds for payment there, and then offered to pay the face of the note and interest to the plaintiff indorsee, who refused to accept this offer because the protest fees were not also tendered. This tender was kept good by deposit in a bank until this action was brought, and by payment into court. The trial court gave judgment for the plaintiff, including costs and protest fees. This judgment was modified, so as not to include costs or protest fees. The court said that the note was not finally dishonored until the close of the day of maturity, and therefore there was a valid tender of the amount due from the maker within section 70, N. I. L. See *Modern Laundry Co. v. Dilley* (Ark.) 163 S. W. 1197.

that as against them there is no necessity for presentment at a particular place, or of protest, or of notice of dishonor, and that all parties look to them to eventually pay the instrument.² As has been shown, the bill and its acceptance amounts to a transfer to the holder of property of the drawer in the acceptor's hands to the amount of its face value. In technical phrase, there is a direct privity of contract between the holder and acceptor, and at common law an acceptance was evidence of money had and received by the acceptor to the use of the holder.³ The drawer is presumed to draw upon his funds in the hands of the drawee; the payee is presumed to have given a full value for the bill; and, when the drawee accepts the bill, he becomes an immediate debtor to the payee, as upon a valuable consideration paid to the drawer by the payee and by the drawer to the acceptor of the funds in the hands of the acceptor. The acceptor stands in the same relation to the payee as the maker of a note does to the indorsee; and the drawer is regarded in the light of an indorser.

But the student must not identify the acceptor of a bill and the maker of a note further than that they make the same promise to the payee and subsequent holders. Beyond this point they differ. An acceptor enters into a contract relation based upon rights or liabilities accruing to or against the drawer, payee, and perhaps indorsers. The maker can make but one contract, and that is with the payee. All other rights and liabilities arising to or against the makers of notes are merely a transfer of such as the payee himself has. But with the acceptor, there is a call for the adjustment of the conflicting rights of drawer and

² In Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427 (N. I. L.), it was held that where a person signs his name on the front side of the note, under a maker's signature, he is liable as a co-maker, and cannot, by parol evidence, show that it was the understanding of the plaintiff payee with him that he was to be bound as an indorser only. The court treats the case as settled by the N. I. L. But the instrument seems to have been non-negotiable. See Westbay v. Stone, 112 Mo. App. 411, 87 S. W. 34.

³ Black v. Caffe, 7 N. Y. 281; Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396.

acceptor, drawer and payee, payee and acceptor, and perhaps of indorsers with each of these parties and with each other prior to the time of acceptance—a body of rights and liabilities distinct from any involved in the making of a note. These will be discussed therefore in the sections next following. All that is meant to say here is that there is no difference in their contract classification between the promise of the maker and that of the acceptor to pay the money called for in the instrument.⁴ They are alike, independently of all other contract rights, *prima facie* promises to pay the instrument when it becomes due according to the tenor of the instrument.⁵

FACTS WHICH THE ACCEPTOR ADMITS

70. The acceptor of a bill of exchange, by the acceptance, admits:⁶

- (a) The genuineness of the drawer's signature.
- (b) The existence of the drawer.
- (c) The capacity of the drawer to make the draft.
- (d) His authority to draw for the sum named.
- (e) Where the bill is to the payee's order, the existence of the payee and that the payee was competent to make the indorsement.⁷

What are called the "warranties" of the acceptor are a phase of the legal doctrine of estoppel. "An estoppel," says Lord Coke, "is when a man is concluded by his own act or acceptance to say the truth." And with bills the acceptor is precluded from testifying in the instances given in the

⁴ Bull v. Sims, 23 N. Y. 570; FAIRCHILD v. OGDENSBURGH, C. & R. R. CO., 15 N. Y. 337, 69 Am. Dec. 606, Moore Cases Bills and Notes, 69; Miller v. Thomson, 3 Man. & G. 576; Warden & Vestrymen of St. James Church v. Moore, 1 Ind. 289; Marion & M. R. R. v. Hodge, 9 Ind. 163.

⁵ Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366.

⁶ N. I. L. § 62. The wording of the English B. E. A., shows better the reasons underlying these rules. Section 88.

⁷ These rules probably apply to the acceptor *supra* protest also.

principal text. It may well be in case of an acceptor that his drawer had no existence, or that his signature is forged, or that the acceptor had no funds of the drawer in his hands when he accepted the bill. But the legal estoppel shuts out all evidence of these facts, and thus they cannot avail as defenses. From this rule of evidence it is but an easy step to develop a right of quasi contract. The holder of the bill may, perhaps, by the operation of this very rule, and by its operation alone, be enabled to recover the amount of the bill from the acceptor. This being established as a rule of business, it grows to be something more than a mere rule of evidence. With indorsements it becomes a distinct right on which persons may be presumed to act when they discount the instrument. With them it is not inaccurate to speak of these estoppels as warranties, or distinct stipulations created by law and embodied in the contract indorsement.⁸

As between the payee or some subsequent holder, who has taken the bill in good faith, and the acceptor, whose acceptance has given currency to the bill, the latter must bear the loss, if any arises. He may not give in evidence any of the defenses specified in the principal text.⁹ This

⁸ In the case of *Bank of Commerce v. Union Bank*, it was held that the drawee was presumed to know the handwriting of the drawer, and the payment of a bill by him is an admission which the drawee may not deny as between himself and the holder. Even though such signature is discovered subsequently to be a forgery the drawee cannot recover the amount paid to an innocent holder. This rule is founded on the presumed negligence of the drawee to fail to detect an irregularity in the signature, but does not apply where the forgery is in the body of the bill. 3 N. Y. 230. And see *Wilkinson v. Lutwidge*, 1 Strange, 648. Where a forged bill of exchange was accepted and paid by the drawee, he cannot recover back from the indorsee to whom he paid. *Price v. Neal*, 3 Burrows, 1354. An acceptor for honor does not admit the genuineness of the drawer's signature. *Wilkinson v. Johnson*, 3 Barn. & C. 428, Johns. Cas. Bills & N. 88. See N. I. L. § 165.

⁹ Where one has made a bona fide purchase for value of a bill of exchange, before it was accepted, or before the drawee knew of its existence, the acceptor will not be estopped from showing that the drawer's signature is not genuine. In this case the acceptors had done nothing to induce the holder to believe that the signature was

rule is based on sound business reasons. The acceptor's promise is a distinct and separate one to all parties who, upon the faith of it, have given value, in adjusting the equities between parties. It is more just to hold the acceptor to knowing his own correspondent with whom he has business dealings than to subject every holder who may take a bill in its circulation to loss or danger of loss from parties of whom he knows nothing. When the acceptor and the holder are each innocent, the acceptor, who had the best means of knowledge, is the more negligent of the two, and therefore the equities are against him.

Price v. Neal¹⁰ is usually quoted as the leading case in illustration of this. This was an action on the case by Price to recover from Neal the sum paid him on two bills of exchange, of which Price was the drawee. One of the bills had been paid by Price without a previous acceptance; and the other was first accepted, and, after acceptance, indorsed for value to the defendant, and then paid at maturity. There had been a forgery of the drawer's signature in the case of both bills. Lord Mansfield said: "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted it or paid it; but it was not incumbent on the defendant to inquire into it." This means that it is a just and reasonable rule in the conduct of business to require the acceptor, when the bill is presented for acceptance or payment, to examine the signature of the drawer. He, better than the payee or any innocent third party, can be supposed to know the signature and handwriting of the drawer—usually his

genuine at the time of his purchase, and consequently he had no right of action against them. McKleroy v. Southern Bank of Kentucky, 14 La. Ann. 458, 74 Am. Dec. 438; Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366. But see N. I. L. § 62, and comment thereon by Professor Ames, summarized in Brannan, Anno. N. I. L. (2d Ed.) p. 74. As to the responsibility of a bank paying a check upon it for the genuineness of the drawer's signature, see National Bznk of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; Mackintosh v. Elliot Nat. Bank, 123 Mass. 393; Merchants' Nat. Bank v. National Eagle Nat. Bank, 101 Mass. 281, 100 Am. Dec. 120.

¹⁰ 8 Burrows, 1854.

customer or correspondent. He, rather than such party, should be held to detect the forgery, or to know the fact that he had no funds of the drawer in his hands, or that he had no legal right to enter into a binding contract; and if he fails in such examination, and acknowledges by his acceptance the genuineness of the right to make the order upon him contained in the bill, it is his neglect, and must be his loss, rather than that of any one who has taken the bill in good faith and for value.¹¹

¹¹ Hoffman v. Bank of Milwaukee, 12 Wall. 193, 20 L. Ed. 366; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334; Smith v. Chester, 1 Term R. 655; Bass v. Clive, 4 Maule & S. 15; Bank of Commerce v. Union Bank, 3 N. Y. 230; Goddard v. Merchants' Bank, 4 N. Y. (4 Comst.) 149; Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287; NATIONAL PARK BANK v. NINTH NAT. BANK, 46 N. Y. 77, Moore Cases Bills and Notes, 181. N. I. L. § 62, is construed to be declaratory of the doctrine of Price v. Neal. See page 589, chapter X, infra. The drawee bank, paying the amount called for by the instrument to a holder in due course, cannot recover back this amount on discovering that the drawee's signature was forged, even though the holder in due course indorses the instrument to the drawee bank. National Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513 (N. I. L.); Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939 (N. I. L.); National Bank of Commerce v. Farmers' & Merchants' Bank, 87 Neb. 841, 128 N. W. 522 (N. I. L.). In these cases it was said that the bank did not become the holder of the instrument, and thus there was not a negotiation within the meaning of sections 65, 66, N. I. L. Another reason for this conclusion seems to be that sections 65 and 66, N. I. L., state the content of the implied warranty of the vendor in the sale of a negotiable instrument. Here the transaction is not a sale, in that the value given purports to be a compliance with the order of the drawer by the agent of the drawer, and, although there is a transfer of title to such agent, such a warranty by the transferee is not the usual expectation of the parties. See infra, § 118, "Payment or Purchase." A fortiori the drawee cannot recover back money paid on a draft on the assumption that the attached bills of lading were genuine where the indorsee, to whom such payment was made, made no express representations as to the genuineness of such bills of lading and acted in entire good faith. Springs v. Hanover Nat. Bank, 103 N. E. 156 (N. I. L.). Accordingly such a transfer is not within the spirit of sections 65, 66, N. I. L. But see Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605; infra, p. 205. The only ground for recovering back the money paid, then, is that the payment was made

These fundamental reasons, which we have given in the particular instance of forgery of the drawer's signature, have governed the courts in the other cases we have classified. Where there is no such person in fact as the drawer, then it has been decided¹² that the fair construction of the

under a mistake of fact. Where the holder to whom the payment was made would have discovered the forgery by the use of ordinary care, and the drawee has exercised ordinary care, the payment may then be recovered. For a questionable application of this principle see Williamsburgh Trust Co. v. Tum Suden, 120 App. Div. 518, 105 N. Y. Supp. 335 (N. I. L.). In another respect section 62, N. I. L., has been construed as declaratory of the pre-existing law as laid down in Price v. Neal, *supra*. Where the person to whom the payment is made, or for whose benefit it is made, has given no value for the instrument or the payment, the equity of that person is not, within the meaning of the rule laid down in Price v. Neal, *supra*, equal to that of the drawee who makes the payment under a mistake of fact. Accordingly, in Title Guarantee & Trust Co. v. Haven, 196 N. Y. 487, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131 (N. I. L.), it was held that where an unknown forger drew a check in the name of one G. as drawer in favor of the city collector of taxes, to be applied in extinguishment of a lien of the city for the amount of an assessment for street improvements, upon the land of the defendant in this action, and the drawee bank, believing the signature to be genuine, paid its amount to such collector payee, who applied the payment in extinguishment of the lien, and where neither the ostensible drawer nor the unknown forger owed the defendant anything in payment of which the check was issued, the drawee bank was entitled to be put in the same position as to this defendant that the city was in prior to the extinguishment of the lien.

¹² Cooper v. Meyer, 10 Barn. & C. 468. In this case, the defendants accepted for the accommodation of D. bills drawn, apparently, by W., and some by U. & Co., and indorsed by the same, but in fact drawn and indorsed by D., for whom the bills were discounted by plaintiff. It was proved that the drawers and indorsers were fictitious, and that the names were written by D. It was held that defendants should not have accepted without knowing whether or not there were such persons as the supposed drawers. As they accepted without inquiry they were considered as undertaking to pay to the signature of the actual drawer. In Bass v. Clive it was held that the acceptor, before accepting a bill drawn upon him in the name of an aggregate firm, was bound to know whether the firm consisted of a plurality of persons, and when he accepted he was estopped from averring that it was not in fact drawn by an aggregate firm, since he has accredited the description by accepting the bill when so drawn.
4 Maule & S. 13.

acceptor's undertaking is that he will pay to the order of the same person that signed for the drawer. He ought not to have accepted the bill without knowing whether or not there were such persons as the supposed drawers. If he chooses to accept without making the inquiry, then he must be considered as undertaking to pay to the signature of the person who actually drew the bill.

Closely connected with this is the kindred doctrine that the acceptor may not set up as a defense that the drawer had no capacity to make the draft. He may not, for instance, say that the drawer is an infant,¹³ or a lunatic, or a married woman,¹⁴ or a bankrupt,¹⁵ or that, as a corporation, the act of drawing was ultra vires.¹⁶ It is no defense that the acceptor can recover nothing over against the drawer because the drawer is incapacitated to make a contract, or because the acceptor has none of the drawer's funds in his hands. The acceptor of a bill in theory is presumed to accept upon the funds of the drawer in his hands. In ordinary business affairs, the very theory of a draft implies that the acceptor is entitled to a credit as between him and the drawer on their mutual current accounts if he pays the money called for in the bill or accepts it. And so, if he accepts without funds in his hands, and upon the credit of the drawer, he must look to the drawer for his indemnity.¹⁷ If the acceptor were permitted to say, "The drawer is an infant or a lunatic, and I will not pay you upon this bill because the drawer will not pay me or credit me upon our mutual account," or if he were permitted to

¹³ Taylor v. Croker, 4 Esp. 187.

¹⁴ Smith v. Marsack, 6 C. B. 486.

¹⁵ Braithwaite v. Gardiner, 8 Q. B. 473.

¹⁶ Halifax v. Lyle, 3 Welsb., H. & G. 446. In this case a bill was drawn by a corporation on defendant, and was accepted by him. The corporation then indorsed the bill to plaintiff. To the action on this bill, the defendant pleaded that the corporation had no right to indorse. Held, that plea was bad; that the acceptor of a bill payable to drawer's order was estopped from denying that the drawer had authority to indorse it.

¹⁷ Hortsman v. Henshaw, 11 How. 177, 13 L. Ed. 653; JARVIS v. WILSON, 46 Conn. 90, 33 Am. Rep. 18, Moore Cases Bills and Notes, 5; Heuertemate v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

say, "I accepted the bill for the accommodation of the drawer, and the payee or holder took it knowing it to be an accommodation acceptance,¹⁸ and I will not pay it," these would be very serious objections to the bill being negotiated. The reason which has influenced the courts is well stated by Judge Lawrence in *Charles v. Marsden*.¹⁹ "It is to be supposed," he says, "that the drawer persuades a friend to accept a bill from him because he cannot lend him money. Now, would there be any objection, if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due?" The indorsee has discounted the bill on the faith of the acceptor's promise, and it is no answer for the acceptor to say to him, "I have received nothing for this acceptance."

We cannot do better than follow Mr. Daniel in his succinct statement of reasons for the rule that the acceptor warrants, when the bill was indorsed before acceptance, that the payee was competent to indorse. To insure negotiable securities a ready circulation, a person may not dispute the power of another to indorse an instrument, when he asserts by the instrument which he issues to the world that the other has such power. The drawer of the bill, on his putting it into circulation, holds out to all the world that there is such a payee as is described in the instrument, and that, having made the instrument payable to such payee's order, the payee on his part may order the instrument paid to some one else in turn. When the drawee accepts the bill, he assents to these two propositions, and to the proposition, especially, that the payee is competent to indorse. Hence the acceptor may not say that the payee was an infant, or an insane person, or a bankrupt, or a corporation without legal existence.²⁰ "Indeed," says Mr.

¹⁸ *Grant v. Ellicott*, 7 Wend. (N. Y.) 227; *HARGER v. WORRALL*, 69 N. Y. 370, 25 Am. Rep. 206, *Moore Cases Bills and Notes*, 142; *Heuertematte v. Morris*, *supra*; *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358, 11 N. W. 196.

¹⁹ *Charles v. Marsden*, 1 Taunt. 224.

²⁰ N. I. L. §§ 60, 62; *Pontiac Sav. Bank v. Reinforced Concrete Co. (Mich.)* 144 N. W. 486. A bona fide holder of a note, made payable

Daniel, "there could be no reason why the acceptor should be interested to show that the payee was incompetent to make the order, for he has been guarantied in that regard by the drawer, and may charge the amount in account against him, whether the payee were competent or not." ²¹

FACTS WHICH THE ACCEPTOR DOES NOT ADMIT

71. An acceptance does not admit:

- (a) That the payee's or subsequent indorsements are genuine.
- (b) That all the terms contained in the bill at the time of acceptance are genuine.²²

The rules of the acceptor's estoppel, as we have seen, are based upon the supposed negligence of the drawee in failing, by an examination of the signature when the bill is presented, to detect the forgery of the drawer's name, and to refuse payment. The drawee should be supposed to know the handwriting of the drawer, who is usually his customer or correspondent, and, as between him and an innocent holder, the drawee from his imputed negligence should bear the loss. But here the courts stop. It is only the facts pertaining to the drawer, such as his existence, capacity, and authority, that the drawee can be reasonably presumed to be familiar with. But of the payee's indorsement, aside from his competency to indorse, he can know nothing.²³ Nor is there any reason why the acceptor

to a foreign corporation doing business in the state without complying with its law, may recover on the instrument against the maker. *National Bank of Commerce v. Pick*, 13 N. D. 74, 99 N. W. 63 (N. I. L.).

²¹ Daniel, Neg. Inst. § 536; N. I. L. § 29. Under this section it has been held that one who signs a negotiable instrument as guarantor cannot be an accommodation party to the note within the meaning of the N. I. L. *Noble v. Beeman-Spaulding Woodward Co.* 65 Or. 93, 131 Pac. 1008, 48 L. R. A. (N. S.) 162 (N. I. L.).

²² This rule probably applies to the acceptor supra protest.

²³ *Holt v. Ross*, 54 N. Y. 474, 13 Am. Rep. 615. The general rule is

should know that the body of the bill is in the drawer's handwriting, or in any handwriting known to the acceptor. If the alteration or forgery committed is that of the payee's name, or consists in altering the date or amount of the bill, there is no reason why the acceptor should be better able than the indorsers to detect an alteration or forgery. The forgery being in the body of the bill, or in the payee's signature, the greater negligence here is chargeable upon the party who received the bill from the perpetrator of the forgery.²⁴ The result of the foregoing rule is that, if the signature of the payee or of the indorser be forged, the acceptor will not be bound to pay the bill to any one who traces title through such indorsements. And, if he has gone so far as to pay the bill to any one holding it under such forged indorsement, he may, as a general rule, recover back the amount.²⁵ So, also, if the bill has been altered so

that the acceptor admits the handwriting of the drawer, but not of the indorsers, and the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill. And, if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of acceptance. Taney, C. J., in *Hortsman v. Henshaw*, 11 How. 177, 13 L. Ed. 653.

²⁴ *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *White v. Continental Nat. Bank*, 64 N. Y. 620, 21 Am. Rep. 612. Want of consideration for the accommodation obligation is a defense against a holder with notice. *Cowan v. Hudson* (Miss.) 62 South. 275, 45 L. R. A. (N. S.) 720. So also a breach of faith in completing the accommodation obligation by delivery is a defense against a holder with notice. The authority given the accommodated maker by an irregular accommodation indorser to complete the obligation of such accommodation party to the payee is revocable, although based on a consideration. *First Nat. Bank of Teague v. Hiare* (Tex. Civ. App.) 152 S. W. 501.

²⁵ See *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, at page 570, 66 S. E. 768, at page 771, 36 L. R. A. (N. S.) 605. In that case Brannon, J., concurring, said: "Judge Poffenbarger seems to think that it makes no difference whether the forged name is that of the payee or maker of the check. There is a big difference. The next indorser insures the genuineness of a prior indorser's name to a later indorser and the payee bank." But see note 11, supra. The reason for the conclusion, stated in the text, seems to be that, where

as to purport to bind the drawer for a larger sum or in a different manner than in the original bill, he will not be bound to pay the bill. And, if the bill is paid, he may in the same way recover back the money paid upon it.²⁶

ACCEPTOR SUPRA PROTEST

72. The undertaking of the acceptor supra protest is analogous to that of the indorser.
73. To consummate the liability of the acceptor supra protest, it is necessary to take three steps:
 - (a) To present the bill at maturity to the original drawee.
 - (b) Upon refusal of the original drawee to pay, to protest for nonpayment.
 - (c) To present the bill for payment to the acceptor supra protest.

The foregoing doctrines are common among the text writers, and are probably the positions which would be taken on the subject by the courts. The cases, however, involving questions of such acceptances, are not many, and

the bill is genuine in its inception, a holder under a forged indorsement is guilty of a conversion. The drawee bank can charge the drawer only for paying the payee or his indorsee. The payee or his indorsee has a right of action against any holder under a forged indorsement, unless for some reason estopped, in which the full value of the instrument could be recovered. The "equities" of the drawee bank and the holder under a forged indorsement are therefore not equal, within the meaning of the rule of *Price v. Neal*. See article by Professor Ames, 4 H. L. R. p. 297.

²⁶ *Holt v. Ross*, 54 N. Y. 479, 13 Am. Rep. 615; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *New York Produce Exch. Bank v. Twelfth Ward Bank of City of New York*, 135 App. Div. 52, 119 N. Y. Supp. 988 (N. I. L.). But see N. I. L. § 62, and comments by Professor Ames, *Brannan, Anno. N. I. L.* (2d Ed.), 74. See *infra*, chapter X. In the absence of express agreement to the contrary accommodation parties to negotiable paper are liable to each other in the order in which they appear on the paper. *Noble v. Beeman-Spaulding Woodward Co.*, 65 Or. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162 (N. I. L.); *Shea v. Vahey*, 215 Mass. 80, 102 N. E. 119 (N. I. L.); *Erwin v. E. I. Dupont de Nemours Powder Co.* (Tex. Civ. App.) 156 S. W. 1097.

the rules relating to them, therefore, not established.²⁷ The meaning and process of an acceptance supra protest have already been explained.²⁸ As a contract, it is an undertaking to pay on presentment if the original drawee, upon a presentment to him, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor.²⁹ It is thus not like the contract of the acceptor—an absolute engagement to pay at all events—but only a collateral conditional engagement to pay if the drawee does not. Hence the reason of the giving of the acceptance requires a second resort to the drawee when the bill is in the hands of the holder under an acceptance supra protest, and a further protest for non-payment by such drawee.³⁰ It might happen that in the meantime effects would reach the drawee, who had refused in the first instance, out of which the bill might and would be satisfied, if again presented to the drawee when the period of payment arrived. "An acceptance for honor," said Lord Tenterden,³¹ "is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill: 'Keep the bill. Don't return it. And when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money.' This appears to me to be a very sensible interpretation of the nature of acceptances for honor, where the parties say nothing upon the subject." The courts thus clothe with language and interpret the intention of the acceptor supra protest in giving an acceptance and of the holder in receiving it.

²⁷ Cf. N. I. L. §§ 161-170.

²⁸ See pages 145, 146, *supra*.

²⁹ *Hoare v. Cazenove*, 16 East, 391. In this case it was held that the acceptors of a foreign bill of exchange, who, after presentment to drawees and refusal to accept, and protest for nonacceptance, accept the same for the honor of the first indorsers, are not liable on such acceptance unless there has been a presentment to the drawees for the payment and a protest for nonpayment.

³⁰ *Schofield v. Bayard*, 8 Wend. (N. Y.) 488; *Lenox v. Leverett*, 10 Mass. 1, 6 Am. Dec. 97.

³¹ *Williams v. Germaine*, 7 Barn. & C. 468.

Upon the refusal of the original drawee to pay the bill and its protest, it may or may not be paid by the acceptor for honor. If it is paid by him, it seems clear that he can pay only for the honor of the party for whose honor he accepted.³² But unless some party or parties are specified in the acceptance supra protest, the courts construe the acceptance as made for the honor of the drawer.³³ Payments of this kind do not, like a single payment by the original drawee, operate as a satisfaction of the bill, but themselves transfer the holder's rights to the party paying.³⁴ For example, if the payment is made for the honor of a particular indorser, the party paying may sue such indorser and all parties prior to him to whom he could have resorted.³⁵ If he pays for the honor of the bill generally, it is the same as payment for honor of the last indorser, and he may recover against all parties to the bill.³⁶ But if the bill is not paid by the acceptor supra protest,³⁷ then the rule for recovery against him laid down by Lord Tenterden³⁸ is generally applied, and the reasons for it accepted as the true ones. "Whatever is requisite to enable a person

³² Chalm. Bills & N. art. 242, note.

³³ Chit. Bills, 387.

³⁴ Smith v. Sawyer, 55 Me. 141, 92 Am. Dec. 576; Vandewall v. Tyrrell, 1 Moody & M. 87. As to payment supra protest, see post, p. 402.

³⁵ Mertens v. Winnington, 1 Esp. 112. In this case it was claimed by the defense that, where a bill is taken up for the honor of any of the parties whose names are on it, only such person is liable. It was held that, in such case, the party so taking up the bill may be considered as an indorsee paying full value, and consequently entitled to all remedies which an indorsee is entitled to, and to sue all parties to the bill.

³⁶ Fairley v. Roch, Lutw. 891. In *Ex parte Lambert* it was held that where a bill, accepted, being dishonored, was taken up for the honor of the drawer by A., the latter had a clear right as against the drawer. He had a right to stand in the place of the drawer; but he could not make a title stronger than that of the drawer, thus ousting the assignees of the bankrupt drawees of the defense which they would have against him. 13 Ves. 179; *Ex parte Wyld*, 30 Law J. Bankr. 10.

³⁷ "When a bill of exchange is dishonored by the acceptor supra protest it must (probably) be again protested in order to charge the other parties liable thereon." Chalm. Bills & N. art. 187.

³⁸ Williams v. Germaine, 7 Barn. & C. 468.

who has accepted a bill for honor of another to call upon that person to repay him, and to enable him to recover over against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honor. For, if you could recover against an acceptor for honor by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency. For it might be said with some reason that, if the acceptor for honor chose to pay without requiring all the proof from the holder which would be necessary for him to recover upon, the payment would be made in his own wrong, and he would not be entitled to recover over. It seems, therefore, that the same rule as to proof which prevails in the case of an acceptor for honor in suing the party for whose honor he accepts, must also be observed when the holder of a bill sues the person so accepting." This means, if we may be pardoned in amplifying the words of so great a judge, that, in prosecuting the acceptor supra protest, the steps are each to be demonstrated which fix the rights and liabilities of the parties. In the first place it is necessary to show the right of the acceptor supra protest to so accept. This is shown by pleading and proving if such be the case that the bill was first presented to the drawee for acceptance, but that its acceptance was refused and that thereupon, the bill being protested, the acceptance supra protest was made. The contract of the holder at this juncture is construed to be that he and subsequent parties have a right to collect the bill of the acceptor supra protest, provided the bill is not paid when due by the drawee—the legal situation of the prior parties remaining unchanged until the liabilities and rights under the instrument are finally fixed at the time of the presentation of the instrument for payment. At this time the holder who has obtained the acceptance supra protest, or subsequent holders, for the reasons we have given, must present the instrument for payment to the drawee, and if payment is refused again protest it and then present it to the acceptor supra protest for payment. At this juncture the rights of the parties are that the holder who obtained the acceptance

supra protest and all parties subsequent to him have the right to enforce payment against the acceptor supra protest upon pleading and proving the foregoing facts of the first and second presentment, protest, and notice.³⁹ It is probably the doctrine that they may also enforce the bill against parties prior to the time of the acceptance supra protest upon the foregoing fact of the protest for non-acceptance. The acceptor supra protest, if he pays the bill, is then not only subrogated to the rights of parties to the bill whom he pays, but also may recover both from the parties for whose honor he has accepted, and from all parties antecedent to them, all damages he may have incurred by reason of his acceptance. But to do so he must plead and prove all the facts upon which his liability rests.⁴⁰ There seems to be no reason from the equities of the case why the acceptor supra protest should not be subject to the estoppels which are implied in the acceptance of an ordinary acceptor. And although there is conflicting authority it has been held that they are the same.⁴¹ He intends to assume by his act the liability of an acceptor, and his liability would probably be held by the courts to be the same were questions of this character often coming before them for decision. But the rule thus laid down has been but little discussed, and this enunciation of them, therefore, is rather speculative than positive.

³⁹ Baring v. Clark, 19 Pick. (Mass.) 220; Gazzam v. Armstrong's Ex'r, 3 Dana (Ky.) 554; Wood v. Pugh, 7 Ohio, 156, pt. 2.

⁴⁰ Schofield v. Bayard, 3 Wend. (N. Y.) 491; Ex parte Wackerbarth, 5 Ves. 574; Hoare v. Cazenove, 16 East, 391; Byles, Bills, pp. 267, 271.

⁴¹ Goddard v. Merchants' Bank, 4 N. Y. 147; Salt Springs Bank v. Syracuse Savings Inst., 62 Barb. (N. Y.) 101. See, contra, Wilkinson v. Johnson, 3 Barn. & C. 428. But see Phillips v. Thurn, L. R. 1 C. P. 483, 18 C. B. 694, holding that it admits the drawer's signature alone.

DRAWER AND INDORSER

- 73a. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse.⁴²
74. Every drawer promises the payee and subsequent holders, and every indorser promises his indorsee and subsequent holders, that if the bill or note is presented for payment to the drawee, acceptor, or maker, and payment demanded and refused, and the necessary proceedings on dishonor be taken, he will indemnify the holder for loss.⁴³
75. The drawer of a bill of exchange promises the payee and subsequent holders, and the indorsers before acceptance promise subsequent holders, that if on due presentment the bill be not accepted, and necessary proceedings on dishonor be taken, he will indemnify them for loss.⁴⁴
76. The liability of the drawer and of each indorser is several from that of all the other parties to the instrument.

In the chapter relating to "Indorsement" the student was introduced to two of the ideas embodied in the principal text. The first was that an indorsement was a contract separate and apart from that evidenced by the terms set forth on the face of the paper. The second was that in addition to these terms so set forth it was a contract in which the law itself implied others equally important.⁴⁵ The terms last spoken of consist of certain conditions precedent to the right of its enforcement as a contract of indemnity, which were presentment for acceptance to the drawee or for payment either to the acceptor of the bill or

⁴² N. I. L. § 61; B. E. A. § 55 (1) (b).

⁴³ Compare N. I. L. § 61.

⁴⁴ These propositions are adopted from Ames, Bills & N. p. 817. Compare N. I. L. §§ 61, 66.

⁴⁵ See, also, *Castrique v. Buttigieg*, 10 Moore, P. C. Cas. 94.

the maker of the note, and in case of its dishonor then that due notice of that fact should be given the indorser. In the chapter relating to "Acceptance," and in a foregoing section of this chapter, the student was further introduced to the idea that the liability of the drawer is a shifting one. Before acceptance he is the party primarily liable; after acceptance he is the party secondarily liable, his position being that substantially of an indorser, and subject to the rules we have just stated. In a later section of this work we shall show that presentment for acceptance by a holder is not vital to the life of his various contracts with the other parties to the bill. It is only for his better security. And although the holder of a bill, by its nonacceptance, may acquire a right of action against the drawer and indorsers prior to himself, it is not absolutely necessary for him to do so.⁴⁶ These facts being explained, it leaves little to be said about the principal text. In fact, the principal text is set out mainly that the student may fix its statements in mind by way of contrast to the contract of the maker and acceptor.

There are, however, two points to be noticed. They are that the liability of the drawer and indorser is in most respects identical, and that their liability is several. "There is no distinguishing the case of an indorser from that of the drawer," said Lord Ellenborough,⁴⁷ "it having been long ago decided that every indorser is in the nature of a new drawer, every indorsement as a new bill, and that the indorser stands to his indorsee in the law merchant the same as the drawer." With both drawer and indorser a distinct bill is drawn. With the drawer, the contract is between himself and the payee; with the indorser, between himself and his indorsee, the indorser standing in the place of the drawer, the remedy of the indorsee being first against his immediate indorser and then against the original drawer as the assignee and standing in the place of

⁴⁶ Walker v. Stetson, 19 Ohio St. 400, 2 Am. Rep. 405, Johns. Cas. Bills & N. 89; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, Johns. Cas. Bills & N. 104.

⁴⁷ Ballingalls v. Gloster, 3 East, 481.

the indorser. In this respect the case of the promissory note when once indorsed and the bill of exchange are parallel. In the case of the promissory note before indorsement the contract is only a promise to pay, but after indorsement it becomes an order by the indorser upon the maker of the note to pay the debt of the maker transferred to indorser, and again by him as indorser transferred to his indorsee.

The difference between bills and notes is therefore in this respect but of words, the indorser of a promissory note being almost the same as the drawer of the bill of exchange.⁴⁸ It is partly this reason and partly the business one that the drawer and indorser may protect themselves, the drawer by withdrawing his effects from the hands of the acceptor, the indorser by taking steps against parties prior to him, that are the foundations of the rule that both drawer and indorser are entitled to the prior presentment and protest and notice.⁴⁹ It is also the reason of the es-

⁴⁸ Heylyn v. Adamson, 2 Burrows, 669. In this case it was held "that in actions upon inland bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the drawee (or acceptor), but need not prove any demand of the drawer; and that, in actions upon promissory notes by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the maker of the note."

⁴⁹ Blesard v. Hirst, 5 Burrows, 2670. This was a case where an inland bill made payable to one was by him indorsed to a third party who tendered it for acceptance and was refused, and who then kept it for some time without giving notice of the refusal. It was held that the third party should have given notice, and that by failing to do so he took the risk upon himself, as the indorser of the bill was imposed upon. The person who neglected to give notice should suffer for it. In the case of Collott v. Haigh, a bill drawn by defendant upon J. D. and accepted by him for defendants' accommodation, was indorsed to plaintiffs. Upon maturity, time was given to J. D. in consideration of his giving security to plaintiffs, which security proved not to be available. It was held that such granting of time to the acceptor did not discharge the defendant, and he could not defend himself on that ground, or for want of notice, as the bill was for his accommodation. 3 Camp. 281; Gale v. Walsh, 5 Term R. 239; Aniba v. Yeomans, 39 Mich. 171; Newberry v. Trowbridge, 13 Mich. 263.

toppels discussed in the next succeeding sections applying to drawer and indorser alike. And it may be stated generally, and the student must fix it in his mind, that the doctrines of the contract of the drawer are the doctrines of the contract of the indorser, because they are, in their legal effect, one.

The second point to be fixed in the mind is the character of the contract of the drawer and of each indorser as several from that of every other party to the contract. It naturally follows that, so long as the promises of the drawer and indorser are separate and independent, they must always be separate in the liability incurred under them. The indorsee enters into a contract with his immediate party from whom he got the bill and who indorsed it to him. Every prior indorser on the bill, by virtue of his indorsement, makes a promise to each new indorsee. If A., B., C., and D. are indorsers on a negotiable instrument, A. makes separate promises to do certain things with B., C., and D.; B. with C. and D.; and so on. Each makes a separate promise with every individual who comes after him on the instrument. The liability of each indorser is in legal phrase several from that of all other parties to the instrument. Under the old common-law rule this meant that the holder might sue the parties to the instrument one at a time, or he might sue separate indorsers in separate actions at the same time. But if any one of these indorsers thus sued should pay the instrument the claim of the holder against each upon it was satisfied.⁵⁰ It is now generally settled by statute throughout the Union that all the parties to the instrument may be jointly sued upon their several liability, or one or more may be sued at separate times.⁵¹

⁵⁰ Chit. Bills, 538, 539; Daniel, Neg. Inst. § 1203.

⁵¹ As to the American statutes, see Rand. Com. Paper, § 1669.

UNDERTAKING OF DRAWER

77. The drawer of a bill before acceptance undertakes with the payee and subsequent holders:

- (a) That there is a drawee, and that he is capable of accepting.
- (b) That he will accept.

When the drawer issues a bill to the world, he undertakes two things. One is that the situation, nature, or character of the drawee is such that the bill can be accepted; and the other is that the drawee, upon presentment, will accept the bill. The legal interpretation of the words on the face of the bill indicating the place of presentment to the drawee, as, "To John Smith, at Baring Bros.," is that the drawer contracts that the drawee may be found at that place, and the bill presented to him there.⁵² Thus, in case of a bill⁵³ drawn on Paris, where the French convention had passed a decree prohibiting the payment of bills drawn in any country at war with France, the court so applied the rule that ultimately the loss should not fall upon the payee or indorser, but upon the drawer who issued the bill, who, it is to be inferred, was deemed to warrant that the situation of affairs would be such that the bill could be presented for acceptance. If this turned out not to be the case, then the drawer must bear the loss. This loss to be borne by him consists of all loss incurred, such as re-exchange, notarial expenses, and other damage⁵⁴ necessa-

⁵² Edw. Neg. Inst. §§ 530-534; Wing v. Terry, 5 Hill (N. Y.) 180.

⁵³ Mellish v. Simeon, 2 H. Bl. 378.

⁵⁴ Auriol v. Thomas, 2 Term R. 52. In this case a bill of exchange, 2,800 star pagodas, payable to defendant or order, and directed to G. M., Madras, was indorsed to plaintiffs, who discounted it at the rate of exchange, 6s. 6d. per pagoda. On sending the bill to Madras it was returned protested for non-acceptance and non-payment. The plaintiffs recovered 10s. per pagoda and £5 per cent. after end of 30 days' notice to defendant. Such recovery was held not usurious, as it was proved to be the usual custom in case of such bills, as such recovery included charges of exchange and other incidental expenses as well as legal interest. In Gantt v. Mackenzie, a bill of exchange was pre-

rily incidental to the failure to obtain the acceptance, because the party taking the bill was obliged to make these expenditures to collect the bill, and if the drawer's contract was broken, and such collection failed, the drawer must reimburse such party.⁵⁵ The holder of a bill, whom it reaches, in the course of its circulation, may present the bill to the drawee; and, if he refuses to accept, although the bill is not due, the holder may at once turn and hold the drawer, indorsers, and all parties upon the bill prior to himself. The reason of this is to guarantee the circulation of bills, by preventing the drawer from withdrawing funds from the hands of the drawee before the bill is presented, and also to assure the holder that, if anything is wrong between the drawer and drawee, and the drawee refuses to accept, he may at once turn for reimbursement to the parties through whom the bill has been circulated, and who treated it as the equivalent of cash, and were paid money, each in turn, for it.⁵⁶ The further effect of this rule will be considered in the chapter on "Presentment."

The courts speak of this legal relation of the drawer as a stipulation or part of the contract rather than as an estoppel. This is because the reason of the rule is somewhat different from that which is the basis of the estoppels of the acceptor. It is argued that the main purpose of the contract between the drawer, on the one hand, and the payee and person to whom he transfers his rights, on the other, is to remit money. For this purpose the payee and

sented for acceptance and refused, April 17, 1809, and was presented for payment on the 19th of June of the same year. It was decided that the holder was entitled to £10 per cent. as damages, and interest was to be allowed from the time of presentation for payment. 3 Camp. 51. In Mellish v. Simeon, it was held that where the holder has been guilty of no default, the drawer is answerable for the amount of the bill, and also for the re-exchange which is a consequence of the bill not being paid. 2 H. Bl. 378.

⁵⁵ Byles, Bills, 402; Daniel, Neg. Inst. § 1445; Weldon v. Buck, 4 Johns. (N. Y.) 144.

⁵⁶ Ballingall v. Gloster, 3 East, 481; Mason v. Franklin, 3 Johns. (N. Y.) 202; Weldon v. Buck, 4 Johns. (N. Y.) 144; Miller v. Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372; Bank of Rochester v. Gray, 2 Hill (N. Y.) 227.

subsequent holders pay valuable consideration. To effect this purpose, the drawer, on his part, agrees that the money shall be paid at the time, place, and by the person nominated in the bill. Of the very essence of this agreement, therefore, is the fact that the drawee, who may be a stranger to the payee or subsequent holder, should be found in the place where he is described to be.⁵⁷ Otherwise, it would be the duty of the holder to search the world over for the person to pay him in turn the money he had paid the drawer. It is also of its essential nature that the drawee shall have funds in his hand to warrant his accepting, or that he accepts from some other consideration, immaterial to the payee, perhaps, but good as between the drawer and drawee. In other words, as between the drawer and payee, the drawee, though he is designated as the person to make the payment, is a mere agent of the drawer; and the latter, therefore, since he undertakes for his agent's acts, "undertakes that the acceptance be made at all events."⁵⁸

WARRANTIES OF INDORSER

78. Every indorser who indorses without qualification warrants to his indorsee and to all subsequent holders:
- (a) That the bill or note is, in every respect and as to all prior parties, genuine, and neither forged, fictitious, nor altered.
 - (b) That the bill or note is a valid and subsisting obligation, and that the contract obligations of all prior parties are valid.

⁵⁷ *De Wolf v. Murray*, 2 Sandf. (N. Y.) 168; *Hine v. Allely*, 4 Barn. & Adol. 624. In this case an accepted bill was presented at the place of payment specified in the instrument, but the house was closed. It was objected that for this reason there had been no presentation, but it was held that the presentment as described was good. *Buxton v. Jones*, 1 Man. & G. 83; *Pierce v. Struthers*, 27 Pa. 249. As to presentment for acceptance, however, see *infra*, Chapter IX.

⁵⁸ *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 387, 38 Am. Rep. 518.

- (c) That the prior parties were competent to bind themselves, whether as drawer, acceptor, maker, or indorser.
- (d) That he, as indorser, has good title to the bill or note, and also a right to transfer it.⁶⁹

As we have seen, the contract of the indorser, while it embodies the terms of the instrument indorsed, is nevertheless a distinct contract. The contract of the indorser includes a promise of indemnity in case of the dishonor of the instrument, and it also includes certain so-called "warranties." It must be observed, however, that these warranties are implied, not from the undertaking of the indorser to pay in case of dishonor, but as incidents to the transfer or sale of the bill or note.⁷⁰

⁶⁹ Cf. N. I. L. § 66. *Jensen v. Wilslef* (Nev.) 132 Pac. 16 (N. I. L.); *Main Street Bank v. Planters' Nat. Bank of Richmond* (Va.) 81 S. E. 24 (N. I. L.). The holder may, after knowledge of a forgery or other defect, estop himself to set up such defect against his indorser, by failure, within a reasonable time after such knowledge, to notify the indorser of such defect where loss results to the indorser because of such failure. *Gardner v. Hawes* (Tex. Civ. App.) 149 S. W. 273.

⁷⁰ But by section 66, N. I. L., literally construed, an irregular accommodation indorser is declared to make the same warranties as an indorser who transfers title to the instrument in a sale. That section has received this construction. *Smith v. State Bank*, 54 Misc. Rep. 550, 104 N. Y. Supp. 750 (N. I. L.); *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666 (N. I. L.), *semble*; *Bruck v. Lambeck*, 63 Misc. Rep. 117, 118 N. Y. Supp. 494 (N. I. L.), *semble*; *Burke v. Smith*, 111 Md. 624, 75 Atl. 114 (N. I. L.), *semble*; *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644 (N. I. L.), *semble*; *Sedbury v. Duffy*, 158 N. C. 432, 74 S. E. 355 (N. I. L.), *semble*; *Marine Trust Co. v. St. James African Methodist Episcopal Church et al.* (N. J.) 88 Atl. 1075 (N. I. L.). This unfortunate result should be distinguished from the conclusion that after due presentment and notice of dishonor an irregular accommodation indorser is liable for the amount of the bill or note, although he signed as such because mistaken as to the genuineness of the maker's signature. Such a mistake is not an equitable defense, where the plaintiff has parted with value for a transfer of the instrument in reliance upon this accommodation indorsement. *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666, affirmed 180 N. Y. 549, 73 N. E. 1129 (N. I. L.); *Leonard v. Draper*, 187 Mass. 536, 73 N. E.

A warranty may be defined as an agreement with reference to the subject of the contract, but collateral to its main purpose. Warranties may be express or implied, but it is only implied warranties that are here in question. In every contract of sale of personal property, the seller impliedly warrants his right to sell the goods unless the circumstances of the sale or agreement to sell are such as to show that he is transferring, not the absolute property, but only such property or interest as he may have, in the thing sold. Hence from the indorser's transfer or sale of the instrument indorsed it follows that he impliedly warrants that he has lawful title to it and a right to transfer it. As a rule the implied warranties of the seller of personal property do not extend beyond this, and he does not warrant the quality of the thing sold. It is true that there are certain exceptions, which arise in particular cases from the nature of the agreement and of the thing sold, where the law does imply a warranty of certain qualities, but these exceptions are mainly confined to contracts for the sale of unascertained goods—that is, of goods which the seller is to select or manufacture and appropriate to the contract; and therefore these exceptions cannot apply to the sale of a specific bill or note, which the buyer has an opportunity to inspect. In case of the sale of specific goods, the rule of *caveat emptor* applies, and no warranty, strictly speaking, except of title, is implied; subject, perhaps, to a single exception, namely, where the seller is also the manufacturer or grower, it has in some cases been held that a warranty is implied that they are free from latent defects arising

644 (N. I. L.). So where the indorsement is made under the mistaken belief that the maker's obligation is valid when on account of usury it is void. *Horowitz v. Wollowitz*, 59 Misc. Rep. 520, 110 N. Y. Supp. 972 (N. I. L.); *Bruck v. Lambeck*, 63 Misc. Rep. 117, 118 N. Y. Supp. 494 (N. I. L.); *Klar v. Kostiuk*, 65 Misc. Rep. 199, 119 N. Y. Supp. 683 (N. I. L.). See, also, *Re Young's Estate*, 234 Pa. 287, 83 Atl. 201 (N. I. L.). But this section (section 66, N. I. L.) has not generally been held to impose upon the holder who indorses to the drawee, acceptor or maker, when the instrument is paid, the warranties of a transferror upon a sale of the instrument. See note 11, supra. For the reason there stated *Smith v. State Bank*, 54 Misc. Rep. 550, 104 N. Y. Supp. 750 (N. I. L.), seems to have been erroneously decided.

ing from the process of manufacture or growth.⁶¹ It is obvious, of course, that this exception cannot apply to the transfer of bills and notes. Upon the strict analogy of the sale of other personal property it would follow, therefore, that the implied "warranty," in the proper sense of the term, of the indorser would be confined to warranty of title. There is, however, another principle governing the sale of personal property which is material in this connection. Where goods, even if they be specific and the buyer has an opportunity to inspect, are sold by description, there is an implied "condition" that the goods shall correspond with the description. This condition is sometimes improperly called, and generally so called in the United States, a "warranty." But whether this undertaking be called a "condition" or a "warranty," it is the law that if the article sold fails to conform to the description the buyer has a right of action against the seller for its breach.⁶² Applying this principle to the sale of bills and notes, it may fairly be said that if the instrument for any reason is invalid in its inception it is not what it purports to be, a bill or note, but a mere worthless piece of paper; and in such case the purchaser has a right of action against the seller for breach of contract, based on the failure of the thing sold.

There the action was to recover a balance of deposit. The defendant had deducted \$90 from the amount due from it to the plaintiff upon discovering that a check drawn upon it for \$9 was altered before being paid by it to \$90, the amount which it had paid. It appeared that the payee of the check, after altering it, brought it to the plaintiff and asked him to identify him at the bank. The plaintiff went with the payee to the bank, and, after asking the defendant's cashier if the check was good and receiving the reply, "Perfectly, I believe," indorsed it for the identification of the payee. The defendant bank then paid the check as altered. There was, of course, no dishonor, and no notice of dishonor. It was held that the plaintiff was entitled to recover only \$9. Compare *New York Produce Exch. Bank v. Twelfth Ward Bank of City of New York*, 135 App. Div. 52, 119 N. Y. Supp. 988 (N. I. L.).

⁶¹ As to implied warranty of quality, see *Benj. Sales*, § 644 et seq.; *Tiff. Sales*, 167 et seq.

⁶² As to sale by description, see *Benjamin, Sales*, §§ 600, 645; *Tiff. Sales*, 155, 171.

to conform to its description.⁶³ It seems that this principle is the foundation of the so-called warranties of the indorser which are not to be explained by the implied warranty of title. Therefore, when it turns out that a note or bill is forged or altered or void for usury, or that the parties were infants, or that the bill had been stolen, the bank which has taken it, or the party who has accepted it in payment for goods, may turn upon the indorser who transferred it to him, and sue him upon his indorsement. And, when the indorser sets up any of these facts by way of defense, the holder may answer, "I am suing you upon a separate contract in which you warranted these things to me," and the courts conclude the indorser from such a defense.⁶⁴

Thus, in warranting the genuineness of the instrument, the indorser agrees that if it cannot be enforced against the drawer, acceptor, or maker, whose names appear upon it, because these names are forged, these defenses will not avail him;⁶⁵ and this rule also applies in case of prior indorsements.⁶⁶ In warranting its validity he agrees that if the paper cannot be enforced against the acceptor or maker because of some illegality in its inception, for example be-

⁶³ Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199; Daniel, Neg. Inst. § 733a. The indorser warrants only that the instrument is what it purports to be when it leaves his hands. He does not warrant that it will not be destroyed as an obligation by being altered in the future. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.).

⁶⁴ The liability for breach of warranty accrues at the time of indorsement, and the statute of limitation begins to run at that date. Blethen v. Lovering, 58 Me. 437.

⁶⁵ Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310; Mosher v. Carpenter, 13 Hun (N. Y.) 604; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Meacher v. Fort, 3 Hill (S. C.) 227, 30 Am. Dec. 364; Id., Riley (S. C.) 248, 30 Am. Dec. 364; HANNUM v. RICHARDSON, 48 Vt. 508, 21 Am. Rep. 152, Moore Cases Bills and Notes, 134; Condon v. Pearce, 43 Md. 83; York County M. F. Ins. Co. v. Brooks, 51 Me. 506; Chase v. Hathorn, 61 Me. 505; Selser v. Brock, 3 Ohio St. 302.

⁶⁶ Turner v. Keller, 66 N. Y. 66; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Fish v. First Nat. Bank, 42 Mich. 204, 3 N. W. 849; Williams v. Tishomingo Savings Institution, 57 Miss. 633.

cause it was given for a gaming debt,⁶⁷ or void for usury,⁶⁸ or given for other illegal considerations,⁶⁹ these defenses will not avail him.⁷⁰ In warranting the competency of the parties he agrees if the paper cannot be enforced against the original parties because they were incapable of contracting because they were married women,⁷¹ or because

⁶⁷ Bowyer v. Bampton, 2 Strange, 1155, 7 Mod. 334; Edwards v. Dick, 4 Barn. & Ald. 212. See note 60, infra.

⁶⁸ Morford v. Davis, 28 N. Y. 481; Ingalls v. Lee, 9 Barb. (N. Y.) 647; McKnight v. Wheeler, 6 Hill, 492; Ord, Usury, 109.

⁶⁹ Graham v. Maguire, 39 Ga. 531; Succession of Weil, 24 La. Ann. 139. This is not a correct statement of the law. Thus an indorser after maturity does not warrant that the primary obligor has no defense. See N. I. L. §§ 65, 66.

⁷⁰ For another explanation for this conclusion see note 60, supra. Of course, where the accommodation indorsement of the defendant, before delivery, is made with knowledge of the illegality in the inception of the instrument, and the payee also knows of this illegality (where the illegality is more than merely an ultra vires act on the part of a corporation), the payee cannot recover against the indorser. Both are parties to an illegal contract. In Burke v. Smith, 111 Md. 624, 75 Atl. 114 (N. I. L.), this conclusion was reached on the ground that the plaintiff payee was not a holder in due course within the meaning of section 66. This decision shows a reason for in terms limiting the warranty to holders in due course, although in the absence of such a limitation the section should not have been construed to make an illegal contract of warranty enforceable between the immediate parties. Sedbury v. Duffy, 158 N. C. 432, 74 S. E. 355 (N. I. L.). The court there said, referring to N. I. L. § 66: "By correct interpretation these warranties refer only to lawful transactions, and the statute in no wise intended to withdraw contracts of that nature from the effect and operation of our laws against usury. Eaton & Gilbert, Commer., Paper, § 86." The language of the act in limiting recovery on the warranty of the indorser to holders in due course should be liberally construed. It clearly should not be construed to prevent recovery on the warranty of the indorser after maturity by his indorsee. See Vandagrift v. Bates County Inv. Co., 144 Mo. App. 77, 128 S. W. 1007.

⁷¹ In the case of Erwin v. Downs, it was held that the indorsement of a promissory note imports a contract that the makers were competent to contract, and that one who became the holder of such a note for a valuable consideration, before maturity, is not deprived of the right to rely upon the contract of the indorser, even though such holder have knowledge that the makers were incompetent, as being married women. 15 N. Y. 575; Haly v. Lane, 2 Atk. 181; Kenworthy v. Sawyer, 125 Mass. 28; Robertson v. Allen, 8 Baxt. (Tenn.) 233.

they were a copartnership,⁷² or as an agent,⁷³ or as a corporation,⁷⁴ that these defenses will not avail him. And, the reason being the same in case of genuineness and competency, it is probable that this rule applies also to prior indorsers.⁷⁵ In warranting title and right to transfer he agrees that, if the instrument cannot be enforced against the original parties because it was lost by them or stolen from them, these defenses will not avail him, because he held himself out as having a good title, and therefore a right to transfer.⁷⁶

A thoroughly consistent theory, it might be urged, would require that if the principal contract, set forth on the face of the instrument, is void ab initio, all the subsidiary contracts of indorsement depending upon it would also be of no legal effect, because they could never give life to a contract which had no existence.⁷⁷ But even granting this to be so, yet legal theory is overruled by common sense. Besides, it is not always necessary that the principal contract to which a collateral contract of guaranty is added should be enforced in order that the contract of guaranty may avail.⁷⁸ A guarantor can sometimes be held, although no suit whatever can be maintained on the original debt. For it is sometimes the very essence of a guaranty that it is given because the principal debt cannot be enforced, as in cases where the guarantor undertakes to be responsible for the goods to be supplied to a married woman or an infant. Neither does the fact that the guarantor cannot call upon the person for whom he has given his guaranty constitute any defense. The party to whom the guaranty is given

⁷² *Dalrymple v. Hillenbrand*, 62 N. Y. 5, 20 Am. Rep. 438.

⁷³ *Burrill v. Smith*, 7 Pick. (Mass.) 201.

⁷⁴ *Remsen v. Graves*, 41 N. Y. 471; *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (U. S.) 399, 16 L. Ed. 488; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479.

⁷⁵ *Daniel, Neg. Inst.* § 676; *Lennon v. Grauer*, 159 N. Y. 433, 54 N. E. 11.

⁷⁶ *Edw. Neg. Inst.* § 407; *Daniel, Neg. Inst.* § 677; *Rand. Com. Paper*, § 755.

⁷⁷ See note 60, *supra*, for a different view.

⁷⁸ *McLaughlin v. McGovern*, 34 Barb. (N. Y.) 208.

has nothing to do with their mutual relations. The indorser guaranties to such party the payment of the instrument, and, if it is not paid, he immediately becomes liable upon this guaranty.⁷⁹ Whether also he knew of any defects in the instrument is immaterial. If the indorser knew of defects, he is undoubtedly liable under the general principles of warranty already given. If the indorser did not know of defects, he is none the less liable in damages upon the construction of the general contract of indemnity he made when he indorsed the instrument.

The existence of this contract as a distinct stipulation becomes more apparent when we consider the practical application of these rules by the courts. Where the bill or note is forged or altered, for example, it is void, as we have said, because in fact no such legal obligation was ever created. Money, therefore, paid upon the indorsement of such a bill or note, is governed by the same principle that governs other money paid under a mistake of fact. In other cases the equitable action for money had and received will lie against one who has received money which in conscience does not belong to him.⁸⁰ And so, when the maker or acceptor or a prior indorser has refused to pay a note or bill upon the ground that it is void because of forgery, or alteration, or on the ground of usury, gaming consideration, or the like, the holder, relying upon the so-called "warranty" of the indorser, may hold him for the money paid to him for the instrument.

⁷⁹ Remsen v. Graves, 41 N. Y. 471. In the case of Lawson v. Farmers' Bank of Salem, it was held by the court that the liability of the indorser was strictly conditional and dependent upon due demand upon the maker or acceptor and also due and legal notice of nonpayment. The purpose of such demand is to enable the indorser to look to his own interests and to secure his own indemnity. Demand and notice being conditions precedent to the indorser's liability, the holder must make proof of them before he can recover. 1 Ohio St. 206.

⁸⁰ Kelly v. Solarl, 9 Mees. & W. 54.

WARRANTIES OF INDORSER WITHOUT RE COURSE—OF TRANSFERROR BY DELIVERY

79. Every person who negotiates a bill or note by indorsement without recourse or by delivery warrants:
- (a) That the instrument is, in every respect and as to all prior parties, genuine, and neither forged, fictitious, nor altered.
 - (b) That he has good title to the instrument, and also a right to transfer it.
 - (c) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.⁸¹
 - (d) That all prior parties were competent to bind themselves, although the authorities are not unanimous upon this point.
 - (e) That the instrument is a valid and subsisting obligation, although the authorities are not unanimous upon this point, and in states which have adopted the Negotiable Instruments Law this warranty is not implied.⁸¹

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.⁸²

The indorser without recourse and the transferror of a bill or note by delivery stand upon much the same footing. So far as an indorsement and transfer is a promise of in-

⁸¹ N. I. L. § 65 (subd. 4). See comments on this subdivision by Professor Ames and Chas. L. McKeehan, summarized in Brannan, Anno. N. I. L. (2d Ed.) 81, 82.

⁸² *McAdam v. Grand Forks Mercantile Co.*, 24 N. D. 645, 140 N. W. 725, 47 L. R. A. (N. S.) 248 (N. I. L.). The last paragraph follows the language of N. I. L. § 65, and implies that the warranty of the indorser without recourse extends to subsequent holders. Whether it so extends irrespective of statute, quare. It seems that the warranty of the transferror by delivery does not. Chalm. Bills & N. art. 226. But see 2 Ames Cas. Bills & N. 840, 882.

demnity, neither the transferee without indorsement nor the indorser without recourse promises to pay the instrument. In fact, the object of an indorsement without recourse is to relieve such an indorser from his obligation as a promisor of indemnity. He exempts himself by these words from his promise to pay if the parties antecedent to him do not. But because the transfer is in effect a sale, the transferee without recourse, like the seller of a chattel, warrants his title⁸³ to the instrument and its genuineness.⁸⁴ And it would seem upon principle, for the reasons already set forth,⁸⁵ that all the warranties which are implied in the case of unqualified indorsements should apply to the indorser without recourse. Accordingly he warrants the competency of prior parties,⁸⁶ and the validity of the instrument,⁸⁷ although upon the latter point there is conflict of authority, as will be pointed out in the next paragraph.

When the transfer is of paper payable to bearer and is made by mere delivery, since the warranties in both cases arise as incidents to the sale, there seems to be no reason why the same warranties should not be implied as those which arise upon an ordinary transfer by indorsement. The authorities are agreed that in such case the transferee warrants his title⁸⁸ and the genuineness of the instrument,⁸⁹ and, it seems, also warrants at least that he has no knowledge of any fact which would impair the validity of

⁸³ Daniel, *Neg. Inst.* § 670.

⁸⁴ Dumont v. Williamson, 18 Ohio St. 515, 98 Am. Dec. 186; Palmer v. Courtney, 32 Neb. 781, 49 N. W. 754.

⁸⁵ *Ante*, pp. 217-219.

⁸⁶ Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Id.*, 3 Metc. (Mass.) 480 (transfer by delivery).

⁸⁷ HANNUM v. RICHARDSON, 48 Vt. 508, 21 Am. Rep. 152, Moore Cases Bills and Notes, 134; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181.

⁸⁸ Murray v. Judah, 6 Cow. (N. Y.) 484; Herrick v. Whitney, 15 Johns. (N. Y.) 240; Shaver v. Ehle, 16 Johns. (N. Y.) 201.

⁸⁹ Frank v. Lanier, 91 N. Y. 112; Bell v. Dagg, 60 N. Y. 528; N. I. L. § 65. In Cluseau v. Wagner, 126 La. 375, 52 South. 547 (N. I. L.), it was held that the fact that the transferee of a forged note accepted interest on the note at the date of maturity and extended it for a

the instrument or render it valueless.⁹⁰ And it has frequently been held that he warrants the competency of the prior parties,⁹¹ and also the validity of the instrument.⁹² On the other hand, it has been held in a leading case in New York,⁹³ involving a note void for usury, that the transferror by delivery was not liable against such a defect upon a warranty of validity, and that in such case it is necessary for the transferee in order to recover to prove a scienter, that is, to prove that the transferror had knowledge of the defect. The court said that the law excepts only two cases as coming within the doctrine of an implied warranty, namely, a warranty of title and a warranty that the instrument is genuine and not forged. This case has been adversely criticised by the supreme court of the United States⁹⁴ in an opinion which accepts the principle, already explained, that it is a condition of the contract of sale, often miscalled an implied warranty, that the thing sold must be what it is described or purports to be, and that if the instrument transferred be not a valid and subsisting obligation there is a breach of this condition. It is, indeed, only by accepting this principle that it is possible to imply a warranty of genuineness, and the logical application of the principle requires the implication also of a warranty that the instrument is not void, either by reason of incapacity of the original parties or of illegality

year would not preclude his recovery against the transferror on his warranty of the genuineness of the note at the time of transfer, where at the date of maturity the transferee believed the note and mortgage to be genuine.

⁹⁰ Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171. See, also, Edw. Bills & N. § 355; Mandeville v. Newton, 119 N. Y. 13, 23 N. E. 920; Meriden Nat. Bank v. Gallaudet, 13 N. Y. St. Rep. 269.

⁹¹ Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Baldwin v. Van Deusen, 37 N. Y. 487.

⁹² HANNUM v. RICHARDSON, 48 Vt. 508, 21 Am. Rep. 152, Moore Cases Bills and Notes, 134; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181; Giffert v. West, 33 Wis. 617.

⁹³ Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171.

⁹⁴ Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199. See, also, Wood v. Sheldon, 42 N. J. Law, 421, 36 Am. Rep. 523; Daniel, Neg. Inst. § 733a.

in its inception.⁹⁶ The Negotiable Instruments Law⁹⁶ has in part at least adopted the rule as laid down in the New York case; for, while it declares that the general indorser warrants that the instrument is valid and subsisting, it excludes this warranty in the case of transfer by delivery as well as of indorsement without recourse, substituting in its place a warranty on the part of such transferror that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. Where a bill or note is transferred by delivery or indorsed without recourse, the transferee takes the risk of the insolvency of the maker or other principal party unless the transferror be guilty of fraud in passing it off with knowledge of the fact.⁹⁷ A broker or other agent who negotiates a bill or note without indorsement is liable upon the implied warranties applicable to a transferror by delivery, unless he discloses his agency and the name of his principal.⁹⁸

DAMAGES AGAINST THE ACCEPTOR, MAKER, DRAWER, AND INDORSERS UPON THE BILL OR NOTE AND UPON THE WARRANTIES

80. The acceptor of a bill of exchange and the maker of a promissory note is liable, upon its dishonor, for the amount of the bill or note and legal interest, and also notarial expenses where they are allowed by law.

⁹⁶ "The opinion in this case [Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171] * * * admits the common law rule and then denies its essential result by eliminating conditions of nonexistence which are necessarily embraced in it. * * * Either the principle of warranty of identity must be accepted or rejected; it cannot be accepted and its legitimate and inevitable results denied." Meyer v. Richards, *supra*, per White, J.

⁹⁷ Section 115. See note 81, *supra*.

⁹⁸ *Bicknell v. Waterman*, 5 R. I. 43. There is, however, much conflict of authority on this point. See Daniel, *Neg. Inst.* § 737.

⁹⁸ President, etc., of Cabot Bank v. Morton, 4 Gray (Mass.) 156; *Worthington v. Cowles*, 112 Mass. 30. N. I. L. § 69, so declares the law.

Where the drawee of a bill of exchange has agreed for a valuable consideration to accept it, he is liable, upon its dishonor, for his breach of promise to accept, in all damages which are the immediate consequences of such breach.

The measure of damages to be recovered against a drawer or indorser upon his indorsement is—

- (a) On an inland bill: the amount of the bill and interest, and also protest fees where they are allowed.
- (b) On a foreign bill: the amount of the bill, interest, protest fees, re-exchange, or damages in lieu thereof.

The measure of damages to be recovered against the drawer or indorsers in case of a breach of warranty is the original consideration.

It is our purpose to point out in this section the practical application of the rules we have laid down, by showing what damages the courts administer against the parties upon the breach of their contracts. For the present we shall leave the matter of consideration as a basis for damage, both as between parties immediate and not immediate, out of the question. The rules pertaining to this point will be discussed further on. The only point to be considered is the damages which, assuming the contract between the parties to be for value, and enforceable, the courts find were in contemplation of the parties when it was made.

In some of these contracts, important items are exchange and re-exchange. Exchange, as we have seen, is the market value in one country of money to be delivered in another. The drawer of a foreign bill contracts for its payment at the place where it is drawn payable. When the bill is dishonored, the doctrine of re-exchange applies. Re-exchange is a doctrine founded upon equitable principles. It means, for instance, when the payee, for example, gives premium for a bill drawn in this country payable in Paris, France, which is dishonored in Paris, the amount which would restore the payee to the situation he was in when he

bought the bill. This is either the payment of the money in Paris that the payee expected to and would get there, or the payment in this country of those sums, together with the difference in value between the whole sum at Paris and the same amount in this country. This difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country which should sell at Paris for the sum claimed.¹ In many states statutes provide for a fixed amount payable by way of damages in lieu of re-exchange.² Notarial fees are those incurred for a notary where protest is required or permitted by law.

The other principal item of damage is the amount nominated in the principal terms of the paper, and this discussion principally pertains to this, and how far the warranties relate to it. The general rule is that the acceptor and drawer of a bill, the maker of a note, and all indorsers are liable for the amount nominated in the bill, and interest.²

¹ Bank of United States v. United States, 2 How. 737, 11 L. Ed. 289. In Suse v. Pompe, 30 Law J. C. P. 75, 8 C. B. (N. S.) 538, where a bill was drawn and indorsed in Liverpool, payable in English money, directed to V. at Vienna, by whom it was dishonored, in an action by the indorsees against the indorsers it was held that the plaintiffs were entitled to recover as much English money as would have enabled them in Vienna on the day of maturity to purchase as many Austrian florins as they ought to have received from the drawee, with the expenses necessary to obtain them. Byles, J., said: "The most obvious and direct mode of obtaining that English money is to draw on Vienna on the indorser in England a bill at sight for so much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called * * * re-exchange. * * * This bill for re-exchange being negotiated at Vienna puts into the pocket of the holder at the proper time and place the exact sum which he ought to have received from the drawee. * * * Although in English practice the re-exchange bill is seldom drawn, yet the theory of the transaction is as we have above described it, and settles the principle on which the damages are to be computed, although no re-exchange bill be in fact drawn."

² Rand. Com. Paper, § 1720.

² Daniel, Neg. Inst. § 749; Rand. Com. Paper, § 1726. Where the instrument provides for interest, it runs from the date. Dorman v. Dibdin, Russ. & M. 381; Williams v. Baker, 67 Ill. 238; Campbell

It is, however, held, though not without weighty dissent, that as against his immediate indorser the recovery of an indorsee is limited to the amount of the consideration paid with interest.⁸ In addition to this, the rules governing these parties as to re-exchange and fees are as follows: The acceptor at common law is probably not primarily liable to the holder for re-exchange, because his contract is to pay the money named in the bill at the place of payment

Printing Press & Mfg. Co. v. Jones, 79 Ala. 475. See N. I. L. § 36 (subd. 2). Interest on a demand note runs from demand. *Barough v. White*, 4 B. & C. 325; *Breyfogle v. Beckley*, 16 Serg. & R. (Pa.) 284; *Hunter v. Wood*, 54 Ala. 71. Where the rate fixed by law as prevailing in absence of contract is lower than the contract rate, the better opinion is that after maturity the contract rate should still prevail. *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300, 26 Am. Rep. 469; *Cecil v. Hicks*, 29 Grat. (Va.) 1, 26 Am. Rep. 391; *Findlay v. Hall*, 12 Ohio St. 610; *Pruyn v. City of Milwaukee*, 18 Wis. 367. Contra: *Macomber v. Dunham*, 8 Wend. (N. Y.) 550; *Duran v. Ayer*, 67 Me. 145; *Newton v. Kennerly*, 31 Ark. 626, 25 Am. Rep. 592. Cf. *Holden v. Freeman's Saving & Trust Co.*, 100 U. S. 72, 25 L. Ed. 587; *Cromwell v. Sac County*, 96 U. S. 61, 24 L. Ed. 681. See *Daniel, Neg. Inst.* § 1458a. Interest after maturity is by way of damages. Where no interest is reserved, interest runs after maturity at the legal rate. *Lithgow v. Lyon*, Coop. Rep. 29; *Laing v. Stone*, 2 Man. & R. 562; *Swett v. Hooper*, 62 Me. 54; *Godfrey v. Craycraft*, 81 Ind. 476. As to conflict of law governing interest by way of damages, see *post*, 252.

⁸ *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219. In this case it was decided that, where a payee parts, for a discount greater than the legal rate of interest, with a valid note upon which he might maintain an action when mature, such transfer is not usurious, even where the payee indorses the note, and the indorsee may, on nonpayment by the maker, sue the indorser, but that his recovery will be the amount advanced by him and the interest thereon. In *Cram v. Hendricks*, the above case was cited upon a point similar, and the decision was to the same effect. 7 Wend. (N. Y.) 569; *Ingalls v. Lee*, 9 Barb. (N. Y.) 647; *Judd v. Seaver*, 8 Paige (N. Y.) 548; *Hutchins v. McCann*, 7 Port. (Ala.) 94; *Noble v. Walker*, 32 Ala. 456; *Raplee v. Morgan*, 3 Ill. (2 Scam.) 561; *Semmes v. Wilson*, 5 Cranch, C. C. 285, Fed. Cas. No. 12,658; *Bank of U. S. v. Smith*, 4 Cranch, C. C. 712, Fed. Cas. No. 936. But see contra, *Roark v. Turner*, 29 Ga. 455; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Durant v. Banta*, 27 N. J. Law, 624. See *Daniel, Neg. Inst.* §§ 767, 768; 2 Ames *Cas. Bills & N.* 819 (supporting the latter view).

and not at the place of drawing;⁴ nor is he liable for damages;⁵ though the better reason seems to be that he is liable to the drawer, where he has dishonored the bill which he had promised to pay and the drawer has been obliged to pay re-exchange.⁶ It is probably the common-law rule, also, that the maker of a note is liable neither for re-exchange nor damages, because of the supposed rule that notes are subject to the rules of the law merchant only in those respects covered by the enactment of the statute of Anne;⁷ though it must be added that this point is by no means settled.⁸ Protest fees are chargeable against the acceptor and maker only when a protest is required or permitted by law. But when it is required, or permitted but not required, they are allowed as an item of damage.⁹ The drawer and the indorsers, in their succession, are liable for protest fees, and, in case of foreign bills, for all re-exchanges, or else damages in lieu thereof.¹⁰

These rules being understood, it only remains to consider the damages administered by the courts with reference to the drawee, when he refuses to accept, and upon the warranties which have been the subject of discussion in

⁴ Newman v. Goza, 2 La. Ann. 642; Trammell v. Hudmon, 56 Ala. 237; Watt v. Riddle, 8 Watts (Pa.) 545.

⁵ Bowen v. Stoddard, 10 Metc. (Mass.) 375; Manning v. Kohn, 44 Ala. 343.

⁶ Walker v. Hamilton, 1 De Gex, F. & J. 602; Bowen v. Stoddard, 10 Metc. (Mass.) 379, per Hubbard, J.; Re General South American Co., 37 Law T. 599. Some authorities hold that the acceptor is liable for re-exchange to the holder. Daniel, Neg. Inst. § 1449.

⁷ Martin v. Franklin, 4 Johns. (N. Y.) 124; Scofield v. Day, 20 Johns. (N. Y.) 102; Adams v. Cordis, 8 Pick. (Mass.) 260; Lodge v. Spooner, 8 Gray (Mass.) 166.

⁸ Lee v. Wilcocks, 5 Serg. & R. (Pa.) 48; Grant v. Healey, 3 Sumn. 523, Fed. Cas. No. 5,696.

⁹ Johnson v. Bank of Fulton, 29 Ga. 260; German v. Ritchie, 9 Kan. 110; Merritt v. Benton, 10 Wend. (N. Y.) 117 (where it was held that the protest fee is an expense to which the holder of a note is subjected by the default of an indorser, whose duty it is to pay at maturity, and that the holder should therefore recover it. "It may fairly be considered as a charge incident upon the indorser's failure to perform his contract"). See note 1, page 195, supra.

¹⁰ Mellish v. Simeon, 2 H. Bl. 378; Tied. Com. Paper, § 407.

this chapter. Of these latter, the students will have noticed that we have pointed out a distinction between the acceptor, on the one hand, and the drawer and indorser, on the other. In the case of the acceptor, the rules of law were merely to the effect that the acceptor was estopped from denying certain items. There was nothing of a promise which might be the basis of an affirmative right contained in them. The acceptor's liability, therefore, is limited to the contract contained in words of the bill. But the liability of the drawer and indorser on his so-called warranty is the basis of an affirmative right of action. It is different in its nature from the estoppel of the acceptor, because the acceptor is not affirmatively liable as acceptor thereon. He is, however, liable as drawee before acceptance to the drawer, if, under certain circumstances, he does not accept the bill. The drawer, as we have seen, may then have one of two remedies. He may either sue the drawee upon the original consideration or for damages.¹¹ What the original consideration is will be different according to the circumstances of each case. Where the drawer chooses the alternative of damages, he sues upon the promise to accept, and the damages are then measured by his loss and inconvenience, and not by the amount of the draft.¹² The promise to accept is then the foundation of the right of action, and not the bill itself.

The general rule that the warrantor shall pay so much as the actual value of property falls short of what it would be worth if the warranty had been kept, applicable to warranties of quality or title of personal property, does not apply to bills and notes.¹³ With negotiable instruments between immediate parties the recovery of damages is limited to the amount paid out by reason of the breach of warranty, or, in other words, to refunding the consideration.¹⁴

¹¹ See *supra*, p. 119.

¹² 2 Suth. Dam. p. 104; *Ilsley v. Jones*, 12 Gray (Mass.) 260; Sedg. Dam. (6th Ed.) p. 296.

¹³ Sedg. Dam. (6th. Ed.) p. 340; Suth. Dam. p. 149.

¹⁴ *Gompertz v. Bartlett*, 2 El. & Bl. 854; *Aldrich v. Jackson*, 5 R. I. 218; *Bell v. Dagg*, 60 N. Y. 530. See *Cluseau v. Wagner*, 126 La. 375, 52 South. 547 (N. I. L.).

The right upon which such an action rests is that upon which actions for moneys had and received also rest. The first element of such actions is that money or property has been received by the defendant to which in equity and good conscience he is not entitled, and the court, in its remedy, aims to restore just the property received, neither more nor less.¹⁶ The consideration may always be shown between these immediate parties, and the consideration proved always measures the amount of the recovery.¹⁸

These rules we have just given must be applied with caution. They are doubtless the settled law in case of warranties between immediate parties. But even between immediate parties there is not much business reason why the general rule of contracts should be departed from and the consideration returned rather than the contract performed. The effect of the consideration should be, as in other cases, only to make the indorser's promise of indemnity binding, and not to furnish a measure of damages. There is still less reason why the consideration should furnish a measure of damage between parties not immediate. As between them the consideration is not even open to inquiry.¹⁷ And if it be true that the consideration is eliminated as an item of proof, it would logically follow that it would be elimi-

¹⁶ It has been held that an accommodation indorser who indorsed a draft which had without his knowledge been raised, to enable another to obtain the money at a bank, could not be held liable by reason of the alteration without demand and notice, the court holding that an indorser, to be held as guarantor, must have himself received consideration. *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207, 39 Am. Rep. 652. But this case has been adversely criticised on the ground that the consideration paid to the party accommodated is attributable to the accommodation indorser, and that the rule of notice applies only to the indorser's contract of indemnity. See Daniel, *Neg. Inst.* § 669.

¹⁸ *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Braman v. Hess*, 13 Johns. (N. Y.) 52; *Rapelye v. Anderson*, 4 Hill (N. Y.) 472; *Wiffen v. Roberts*, 1 Esp. 261; *Livingston v. Hastie*, 2 Caines, 248.

¹⁷ *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Collier v. Nevill*, 3 Dev. (14 N. C.) 31; *Littell v. Hord, Hardin (Ky.)* 87; *Cowles v. McVickar*, 3 Wis. 725; *Importers' & Traders' Nat. Bank v. Littell*, 47 N. J. Law, 234.

nated as an item of damage also. In which case the other ground of damages—the promise of the indorser to pay the whole instrument—remains for the court to apply. There is privity of contract sufficient for this between remote parties because privity between immediate indorsers is carried forward through the chain of endorsements to the holder prosecuting; so that, in the phraseology of the old common-law remedies, debt would lie¹⁸ as well as assumpsit for moneys paid out on account of the indorsement.¹⁹ And thus the better reason seems, in case of parties not immediate, to support the variation from the rule we have quoted, and to hold that as to them the face of the paper furnishes the measure of damages.²⁰

ACCOMMODATION PARTIES AND PERSONS ACCOMMODATED

81. AN ACCOMMODATION PARTY—Means a person who has signed a bill or note as acceptor or drawer, maker, or indorser, without recompense, and for the purpose of lending his name to some other person as a means of credit.²¹

¹⁸ Onondaga County Bank v. Bates, 3 Hill (N. Y.) 53. In this case the court referred to the case of Willmarth v. Crawford, 10 Wend. (N. Y.) 343, in which it had held that debt would lie by an indorsee against the maker of a note on the ground that, since the statute making promissory notes negotiable, the money payable thereby became, by virtue of the transfer, due and payable to indorsee or holder; and that, in judgment of law, privity of contract existed between the parties. See, also, Hodges v. Steward, 1 Salk. 125; Priddy v. Henbrey, 1 Barn. & C. 674; Stratton v. Hill, 3 Price, 253; Riddle v. Mandeville, 5 Cranch (U. S.) 322, 3 L. Ed. 114.

¹⁹ Barker v. Casidy, 16 Barb. (N. Y.) 177.

²⁰ Mason v. Mason, 3 Cranch, C. C. 648, Fed. Cas. No. 9,245.

²¹ Benj. Chalm. Dig. art. 90; Byles, Bills, 131; Rand. Com. Paper, § 472; 1 Pars. Notes & B. 184. N. I. L. § 29, provides: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. * * *" This definition, as well as that in the text, seems misleading. See note 23, infra.

82. The accommodated party impliedly contracts:

- (a) That he will pay the bill or note.²²
- (b) That he will repay the accommodation party for all loss incurred, if that party is compelled to pay in case of his default.

83. The accommodation party is liable to all parties except the party accommodated.

As between the accommodated and accommodation party, the paper is given gratuitously.²³ Between them there is no binding contract, because the accommodation paper is not based upon a consideration. But subsequent parties,

²² It is because of this promise or the promise to indemnify the accommodating party that the accommodated party cannot recover from the accommodation party on the bill or note. *Peterson v. Tillinghast*, 192 Fed. 287, 112 C. C. A. 545 (N. I. L.); *Flinch v. Wood* (Sup.) 145 N. Y. Supp. 51 (N. I. L.); *Kragne v. Kragne* (Minn.) 145 N. W. 785; *Central Bank & Trust Co. v. Ford* (Tex. Civ. App.) 152 S. W. 700. The obligation on the part of the accommodated party to pay the full amount due on the note or bill at maturity or to indemnify the accommodation party against loss by reason of his having to pay it is what makes the instrument accommodation paper. Thus in *Morris County Brick Co. v. Austin*, 79 N. J. Law, 273, 75 Atl. 550 (N. I. L.), where it was held that the accommodated payee could not recover on the instrument from the accommodating irregular indorser, the court stated obiter that an indorsement is for accommodation, if given in return for an obligation to fully indemnify, although value is received for the loan of the credit. The comments of the court upon section 29, N. I. L., are valuable. So where the agreement of the party to whom the credit is lent is not to entirely take care of the instrument or to repay the entire loss by reason of the payment of it, the obligation is not made entirely for the former's accommodation—it is not called accommodation paper at all. Such is the case of ordinary joint makers, where each promises the other to pay one-half of the amount due. In *Reyburn v. Queen City Saving Bank & Trust Co.*, 171 Fed. 609, 96 C. C. A. 373, the action was by the holder against the maker of promissory notes. The notes were made by the defendant to a corporation payee, which discounted the notes to the plaintiff holder in due course upon the understanding that payee and maker were each to receive one-half of the proceeds of the notes. The court said obiter that this was not accommodation paper.

²³ Usually this is not true. There is usually a promise to indemnify, and frequently some further consideration, given.

who discount the paper, are on a different footing. With them, not only the accommodated, but also the accommodation, party may be considered as entering into a contract upon a consideration received by the accommodated party only,²⁴ for the accommodation party has offered to all the world to loan his credit upon the instrument.²⁵ The parties who, subsequent to the offer, have either discounted the instrument or paid for it when due, have accepted that offer and paid for it, and may enforce it even though themselves subsequent accommodation parties.²⁶ Thus, in accommodation paper there are three classes of relations to be considered:

(1) The liability of the accommodated party to the accommodation party.

(2) The liability upon the paper of the accommodating party to the person for whose accommodation he has given it.²⁷

(3) The liability upon the paper of the accommodating party to all the other parties who take it.²⁸

In case of a bill, if the acceptance be for the drawer's accommodation, the acceptor does not thereby become entitled to sue the drawer upon the bill. But when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received.²⁹ This is equally the case with the accommodation maker of a note. He cannot sue the payee for whom he makes the accommodation. In either case, only the

²⁴ Yeaton v. Bank of Alexandria, 5 Cranch, 49, 3 L. Ed. 33.

²⁵ Meyer v. Hibsher, 47 N. Y. 265.

²⁶ Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109.

²⁷ See note 22, *supra*.

²⁸ Hodges v. Nash, 43 Ill. App. 638, Johns. Cas. Bills & N. 153; Thatcher v. West River Nat. Bank of Jamaica, 19 Mich. 196; Warner, Bushnell & Glessner Co. v. Gibbs, 92 Mich. 29, 52 N. W. 73. The fact that a bill or note was accommodation paper furnishes no defense as against one advancing money upon it. Church v. Barlow, 9 Pick. (Mass.) 547; Thompson v. Shepherd, 12 Metc. (Mass.) 311, 46 Am. Dec. 876; Shaw v. Knox, 98 Mass. 214; Davis v. Randall, 115 Mass. 547, 15 Am. Rep. 148. But see Quinn v. Fuller, 7 Cush. (Mass.) 224.

²⁹ Pearce v. Wilkins, 2 N. Y. 469.

amount paid by the accommodation party can be recovered. The reason for this is that, the maker and acceptor of the instrument being the ultimate parties to it, when the instrument is paid by them it is extinguished, and no longer exists as a valid instrument.⁸⁰ Therefore, the instrument not being in existence, the acceptor or the maker cannot recover upon the instrument itself.⁸¹ The principle is the same when the accommodation party is subsequent to the party⁸² for whom he gives the accommodation as where the accommodated party is the maker of a note and the accommodation party is payee. There, the instrument being without consideration as between the payee and the maker, the accommodation party cannot sue the accommodated party, because the instrument, as between them, is without consideration and a nudum pactum.⁸³ The accommodated party can in no case look to the accommodation party, for the reason that the obligation, as between them, is without consideration and a nudum pactum; and also that the purpose of the instrument was that the accommodation party should give it "the security" of his name.⁸⁴ This being the intention of the obligation, no ac-

⁸⁰ If, however, the accommodation party were an indorser, this reason would not apply, and there seems to be no reason why he should not as a holder recover from his accommodated party, although a subsequent indorser. See *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136 (N. I. L.), considered page 190, note 35, *supra*.

⁸¹ *Griffith v. Reed*, 21 Wend. (N. Y.) 505, 34 Am. Dec. 267; *Young v. Hockley*, 3 Wils. 346; *Pomeroy v. Tanner*, 70 N. Y. 547; *Suydam v. Westfall*, 2 Denio, 205. But in *Fowler v. Strickland*, 107 Mass. 552, it was held that an accommodation payee and indorser, for accommodation of the maker, who took up the note for less than its face, could recover the full amount from the maker.

⁸² *Van Duzer v. Howe*, 21 N. Y. 531; *Kitchel v. Schenck*, 29 N. Y. 515.

⁸³ But see note 22, *supra*, and note 34, *infra*.

⁸⁴ If, on the face of the instrument, the regular accommodation party appears to be liable to the accommodated party, the only reason, it seems, that the accommodated party cannot recover from the accommodation party on the instrument is, not that the purpose of the parties differed from the terms of the instrument, but that to permit a recovery would result only in a circuity of action. Thus in

tion will lie in behalf of the party to whom accommodation is given.⁸⁵

These relations between the accommodated and accommodation parties do not invalidate it as to third parties. Knowledge of the mere want of consideration between the original parties will not alone prevent the purchaser from becoming a bona fide holder.⁸⁶ Accommodation paper is daily placed in the market for discount or sale, and the indorsee or purchaser who knows that a bill or note was drawn, made, accepted, or indorsed for accommodation is as much entitled to recover as if he had been ignorant of the fact.⁸⁷ The purchaser of accommodation paper with

Gerli v. National Mill Supply Co., 78 N. J. Law, 1, 73 Atl. 252 (N. I. L.), it was held that parol evidence was not admissible to show that, where the defendant maker signed, it was understood between the defendant and the plaintiff indorsee that the note was not to be paid by the maker, but by a third party, who irregularly indorsed the instrument, and to whose benefit the consideration for the note moving from the plaintiff was appropriated.

⁸⁵ *Jackson v. Warwick*, 7 Term R. 121; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604; *Knight v. Hunt*, 5 Bing. 432; *Sparrow v. Chishman*, 9 Barn. & C. 241; *THOMPSON v. CLUBLEY*, 1 Mees & W. 212, Moore Cases Bills and Notes, 136. In this action by an indorsee against the acceptor of a bill of exchange, it was held that the acceptor might show that the acceptance was for the accommodation of the plaintiff, and that he had received no consideration from the drawer, and also that it was agreed that when due, the bill should be taken up by the plaintiff.

⁸⁶ *Fitch v. McDowell*, 80 Hun, 207, 30 N. Y. Supp. 31; *Palmer v. Field*, 76 Hun, 229, 27 N. Y. Supp. 736.

⁸⁷ *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326; *Meyer v. Hibsher*, 47 N. Y. 265; *Montross v. Clark*, 2 Sandf. (N. Y.) 115; *Lincoln v. Stevens*, 7 Metc. (Mass.) 529; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 163, 32 Am. Rep. 438; *Thatcher v. West River Nat. Bank of Jamaica, Vt.*, 19 Mich. 196; *Jones v. Berryhill*, 25 Iowa, 289; *Cronise v. Kellogg*, 20 Ill. 11; *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544 (N. I. L.). Where an accommodation note was executed at the request of the person to whom it was delivered, on his statement that he needed money and had exceeded his line of discounts, and was made payable to a bank, the obvious purpose was to procure its discount at such bank; and the fact that when it made the discount it was chargeable with notice of the purpose for which the note was given would not prevent its recovery thereon. *Israel v. Gale*, 174 U. S. 391, 19 Sup. Ct. 768, 43 L. Ed. 1019.

mere notice of the accommodation is a bona fide purchaser.³⁹ The bill is accepted or note made for the accommodation of another, for the purpose of furnishing a guaranty. The fact that all the world knows it was a guaranty without consideration is immaterial.⁴⁰ And if the accommodation party seeks a defense in saying that it is accommodation paper, it will not be necessary for the holder to show on his part in rebuttal that he gave value for it.

This rule is subject to modifications. In New York⁴¹ the authorities depart from the English rule. An accommodation indorser is discharged by the transfer of a bill or note after maturity, because it is considered unfair to treat an accommodation indorsement as a continuing guaranty.⁴² It was not the intention of the accommodation indorser to

³⁹ Grant v. Ellicott, 7 Wend. (N. Y.) 227; Brown v. Mott, 7 Johns. (N. Y.) 361; Montross v. Clark, 2 Sandf. (N. Y.) 115; Thatcher v. West River Nat. Bank of Jamaica, Vt., 19 Mich. 202; Charles v. Marsden, 1 Taunt. 224; Jones v. Berryhill, 25 Iowa, 289; Bank of Ireland v. Beresford, 6 Dow, 237; section 29, N. I. L.; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666 (N. I. L.), affirmed 180 N. Y. 549, 73 N. E. 1129; Neal v. Scherber, 207 Mass. 323, 93 N. E. 628 (N. I. L.).

⁴⁰ In the case of Grant v. Ellicott, 7 Wend. (N. Y.) 227, holding that, in an action by the payee against the acceptor, the fact of an acceptance being for accommodation was no defense, the court cited the opinion of Lord Eldon in Smith v. Knox, 3 Esp. 46, to the effect that where an accommodation paper is sent out it is no answer, in an action upon such bill, that the acceptor accepted for the accommodation of the drawer, and that such fact was known to the holder. If a bona fide consideration were given, the holder could recover, though with full knowledge of the transaction. See, also, Charles v. Marsden, 1 Taunt. 224.

⁴¹ Chester v. Dorr, 41 N. Y. 279.

⁴² In the case of Chester v. Dorr, it was held that an accommodation indorser, without consideration, of a promissory note, is not liable to a transferee after maturity from the person for whose accommodation it was indorsed, although the transferee paid full consideration. The defense of want of consideration attaches after maturity, into whatever hands it may come. In the course of his opinion, Woodruff, J., said: "I deem the just view of the subject to be that when a note has become due, and is dishonored, the rights and responsibilities of the parties thereto are fixed * * * and thereafter he who takes it takes it with knowledge of its dishonor, * * * and with just such right to enforce it as the holder has,

be liable upon his indorsement for all time. It was only his intention to give indemnity to such persons as took the bill or note during the time when, by its terms, it was supposed to circulate, or, in other words, up to the time of the maturity of the instrument. And it would be contrary to the intention of the parties and unwarrantable to create extensions of time after the instrument had become due. This modification prevails in some other states.⁴² It is in direct contradiction to the English and to the common-law rule.⁴³

Another modification of this rule applying to immediate parties is in case of what is called "diversion." It often happens that one business man tells a second that he wants to borrow his credit for a specified purpose, and, to further that purpose, the second man accepts a bill, or makes or indorses a note for the first to discount. This arrangement amounts to an agreement between them that the instrument shall be devoted to that especial purpose. And the questions arising upon the diversion of accommodation paper are mainly whether the instrument has been used for the purpose for which it was given or not.

The cases make a distinction between material and immaterial diversion. A material diversion has these elements: (1) The accommodation party must have some interest in the application of the money raised on the bill or note. Unless he has, he is not in a position to object that there has been a misapplication of the paper on which he is the accommodation party.⁴⁴ (2) The accommodation

and no other." *Chester v. Dorr*, 41 N. Y. 279. See, also, *Hascall v. Whitmore*, 19 Me. 102, 36 Am. Dec. 738.

⁴² *Bower v. Hastings*, 36 Pa. 285; *Barnett v. Offerman*, 7 Watts (Pa.) 130; *Hoffman v. Foster*, 43 Pa. 137; *Battle v. Weems*, 44 Ala. 105; *Bacon v. Harris*, 15 R. I. 599, 10 Atl. 647. But see *MARLING v. JONES*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996 (N. I. L.), *Moore Cases Bills and Notes*, 139. Compare *Comstock v. Buckley*, 141 Wis. 228, 124 N. W. 414, 135 Am. St. Rep. 34 (N. I. L.). See page 275, *infra*.

⁴³ *Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 Man. & G. 101; *Carruthers v. West*, 11 Q. B. 143; *Stein v. Iglesias*, 3 Dowl. 252; *First Nat. Bank of Salem v. Grant*, 71 Me. 374, with note, 36 Am. Rep. 334; *Seyfert v. Edison*, 45 N. J. Law, 393. See post, p. 275.

⁴⁴ *Edw. Neg. Inst.* § 451; *Mohawk Bank v. Corey*, 1 Hill (N. Y.)

bill or note must be made for some specific purpose, and be diverted to some other purpose.⁴⁵ An immaterial diversion is where an accommodation bill or note is made for the purpose of loaning the parties credit generally,⁴⁶ or where the substantial design for which the instrument was given is not departed from,⁴⁷ or where the agreement for which the instrument was given and which is broken is not one of substance and is unimportant. An immaterial diversion cannot avail as a defense. A material diversion is thus, in some respects, like a contract, based upon a consideration. There is some substantial interest at stake which makes it binding upon the accommodation party to carry out its purpose. If he fails to do this, the reason for its being given fails. It then becomes the duty of the accommodated party having it in possession to return it. If, in defiance of the agreement, the note is misapplied, then it is a fraud, which, as in the case of other contracts, vitiates the agreement between parties and privies, and against the defense of which the courts will allow no recovery.⁴⁸ The purchaser of accommodation paper obtained by fraud, deception, or fraudulently misapplied, with notice of these facts, is not a bona fide holder, but rather, if he attempts to recover upon the paper, is a partaker in the fraud.⁴⁹

513; Story, Bills, § 191; Dawson v. Goodyear, 48 Conn. 548; Quinn v. Hard, 48 Vt. 375, 5 Am. Rep. 284; Fetters v. Muncie Nat. Bank, 34 Ind. 254, 7 Am. Rep. 225.

⁴⁵ Bank of Rutland v. Buck, 5 Wend. (N. Y.) 66; Kasson v. Smith, 8 Wend. (N. Y.) 437; Spencer v. Ballou, 18 N. Y. 327; Woodhull v. Holmes, 10 Johns. (N. Y.) 231.

⁴⁶ Cole v. Saulpaugh, 48 Barb. (N. Y.) 104; Schepp v. Carpenter, 51 N. Y. 602.

⁴⁷ President, etc., of Bank of Chenango v. Hyde, 4 Cow. (N. Y.) 587; Powell v. Waters, 17 Johns. (N. Y.) 176.

⁴⁸ Denniston v. Bacon, 10 Johns. (N. Y.) 198; Lay v. Wallace, 106 Ark. 459, 153 S. W. 601.

⁴⁹ In the case of Small v. Smith, 1 Denio (N. Y.) 583, it was held that where accommodation paper had been negotiated in violation of an agreement between payee and maker, upon which agreement the payee had indorsed, the holder could not recover against such accommodation indorser, unless the note had been received in good faith, for a valuable consideration, and without notice of the agreement. Where the holder took such a note with notice of an agreement, he

Carrying in mind that accommodation paper is a mere loan of credit, or, as it sometimes is put, a loan of money, the purchaser being the lender, and the seller of the paper the borrower,⁵⁰ it is easy to reach the next logical step in the theory. Where there is no limitation or restriction as to the manner in which accommodation paper is to be used, the accommodated party is at liberty to sustain his credit with it in any way he chooses. He may appropriate it to any purpose. In such a case there can be no substantial material diversion;⁵¹ and, even when there is a departure from the express directions of the accommodation party in regard to the note, it will sometimes not amount to a material diversion. The accommodation party may, for instance, direct it to be discounted at one bank, and the accommodated party may discount it at another,⁵² and generally, if the paper has accomplished the purpose in the minds of the parties at the time of giving the accommodation and answers the test that it has in no wise changed the responsibility of any of them, the diversion will be disregarded by the courts and deemed immaterial.⁵³

was held to have taken subject thereto. *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Brown v. Taber*, 5 Wend. (N. Y.) 568; *Farmers' & Citizens' Nat. Bank v. Noxon*, 45 N. Y. 762; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Daggett v. Whiting*, 35 Conn. 372; *Evans v. Kymer*, 1 Barn. & Adol. 528; *Key v. Flint*, 8 Taunt. 21; *Gray v. Bank of Kentucky*, 29 Pu. 365; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Hidden v. Bishop*, 5 R. I. 29; N. I. L. § 55. See p. 360, Chapter VII, *infra*. See, also, *Trust Co. of St. Louis County v. Markee* (C. C.) 179 Fed. 764 (N. I. L.).

⁵⁰ *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Clark v. Sisson*, 22 N. Y. 312; *Newell v. Doty*, 33 N. Y. 83.

⁵¹ *Cole v. Saulpaugh*, 48 Barb. (N. Y.) 104; *Seneca County Bank v. Neass*, 3 N. Y. 442; *Grandin v. Le Roy*, 2 Paige (N. Y.) 509; *Mohawk Bank v. Corey*, 1 Hill (N. Y.) 514; *Agawam Bank v. Strever*, 18 N. Y. 502.

⁵² *Powell v. Waters*, 17 Johns. (N. Y.) 176; *President, etc., of Bank of Chenango v. Hyde*, 4 Cow. (N. Y.) 587.

⁵³ *Duel v. Spence*, 1 Abb. Dec. (N. Y.) 550; *Seneca County Bank v. Neass*, 3 N. Y. 442; *Duncan v. Gilbert*, 29 N. J. Law, 521; *Jackson v. First Nat. Bank of Jersey City*, 42 N. J. Law, 178; *Briggs v. Boyd*, 37 Vt. 538; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Senft v. Schaefer*, 81 Misc. Rep. 152, 142 N. Y. Supp. 380 (N. I. L.).

The fact that paper was originally given for accommodation does not affect the ordinary rule that the holder as against any one not his immediate indorser is not under the necessity of showing that he gave value.⁶⁴ He may recover the full amount of the paper, but as to this the authorities are conflicting, some holding that his recovery is limited by the amount paid.⁶⁵ It is immaterial that the holder acquired the paper for a pre-existing debt,⁶⁶ or as collateral security; although if he acquired it as collateral security he can recover from the accommodation party only the amount of the debt.⁶⁷ A partner has no right to make accommodation paper in the firm name, but the fact that the paper was so made without authority is no defense against a bona fide purchaser.⁶⁸ Neither is it a defense against a bona fide purchaser that paper executed by a corporation was accommodation paper, and ultra vires.⁶⁹ Presentment for payment is not required in order to charge

⁶⁴ *Millis v. Barber*, 1 Mees. & W. 425; *HARGER v. WORRALL*, 69 N. Y. 370, 25 Am. Rep. 206, Moore Cases Bills and Notes, 142.

⁶⁵ *Daniel, Neg. Inst.* §§ 754-757. As to the right of a purchaser for value in general to recover the full amount when less is paid, post, p. 428.

⁶⁶ *GROCERS' BANK OF NEW YORK v. PENFIELD*, 69 N. Y. 502, 25 Am. Rep. 231, Moore Cases Bills and Notes, 138; *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728.

⁶⁷ *Nash v. Brown*, Chit. Bills (10th Ed.) 53; *Hilton v. Smith*, 5 Gray (Mass.) 400; *Atlas Bank v. Doyle*, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219. This is true only in case he holds the instrument as collateral security for the debt of the accommodated party, for then only must this result be reached in order to prevent circuity of action. See Chapter VIII, note 6, p. 417.

⁶⁸ *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Beach v. State Bank*, 2 Ind. 488; *Waldo Bank v. Lumbert*, 16 Me. 416; *Hogarth v. Latham*, 3 Q. B. Div. 643. The purchaser is of course affected with notice if there is anything in the character of the indorsement, as for example if it be an irregular indorsement, or in the circumstances, to inform him that the paper was given for accommodation. *Rand. Com. Paper*, § 419. See p. 441, *infra*.

⁶⁹ *Bird v. Daggett*, 97 Mass. 494; *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *American Trust & Savings Bank v. Gluck*, 68 Minn. 129, 70 N. W. 1085; *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171. See Chapter VII, page 292, *infra*.

an indorser for whose accommodation the instrument was made or accepted, for the reason that he has no recourse against any other party; nor is he entitled to notice of dishonor.⁶⁰ Payment by the party accommodated, since he is in fact primarily liable, operates as a discharge of the instrument.⁶¹

CONFLICT OF LAWS

- 83a. The validity of the contract of the acceptor, maker, drawer, and indorser of a bill or note is determined generally by the law of the place where the contract is made.
- 83b. The interpretation and obligation of the contract of the acceptor, maker, drawer, and indorser of a bill or note are determined by the law of the place where the contract is made, unless the contract is to be performed in another place, in which case the law of the place of performance governs.⁶²

Conflict of Laws

A few words must be said concerning the so-called "conflict of laws," in its effect upon the rights and liabilities of the parties to negotiable instruments. Since a bill or note may be drawn or made in one country, accepted or payable in another, indorsed in a third, and suit may be brought in a fourth, questions frequently arise, where the laws of the different countries conflict, as to which law governs. Sometimes the governing law is the law of the place where the contract is made, or the *lex loci contractus*; sometimes the law of the place where the instrument is payable, or the *lex loci solutionis*; and sometimes the law of the place where

⁶⁰ Sharp v. Bailey, 9 Barn. & C. 44; Miser v. Trovinger's Ex'rs, 7 Ohio St. 281; Hull v. Myers, 90 Ga. 674, 16 S. E. 653. See N. I. L. §§ 80, 115.

⁶¹ Lazarus v. Cowie, 3 Q. B. 459; Cook v. Lister, 32 Law J. C. P. 121; BLENN v. LYFORD, 70 Me. 149, Moore Cases Bills and Notes, 194; Chalm. Bills & N. art. 234. To this effect are N. I. L. §§ 119, 121. Compare 2 Ames Cas. Bills & N. 825. See post, p. 393 et seq.

⁶² See note 70, p. 248, *infra*.

action is brought, or the *lex fori*. As has already been stated,⁶³ the several states in this respect stand towards each other in the relation of foreign countries, and unfortunately the law of negotiable instruments differs widely in the different states.

Same—Execution and Validity

The law of the place where the contract is made governs the formalities of its execution. This includes the formal validity of the bill or note as drawn or made, and of the contracts of the acceptor and indorsers.⁶⁴ Thus the sufficiency of a parol acceptance is determined by the law of the place of acceptance, and if it be valid there it will be enforced elsewhere, even in a state where an acceptance must be in writing.⁶⁵

The law of the place of contract also governs the validity of the contracts of the different parties.⁶⁶ If the consideration is legal where the instrument is executed, it is valid everywhere; and if illegal where executed, it is invalid everywhere. "The question of * * * validity [of the contract], as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which

⁶³ *Ante*, p. 31.

⁶⁴ *Dacosta v. Davis*, 24 N. J. Law, 319; *Hyde v. Goodnow*, 3 N. Y. 266; *Herdic v. Roessler*, 109 N. Y. 127, 16 N. E. 198; *Evans v. Anderson*, 78 Ill. 558; *Moore v. Clopton*, 22 Ark. 125; *Wood v. Gibbs*, 35 Miss. 559; *Thayer v. Elliott*, 16 N. H. 102. Such is the provision of the English Bills of Exchange Act (section 72, subd. 1). But see *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956. The Negotiable Instruments Law does not deal with the conflict of laws.

⁶⁵ *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. Ed. 245; *Exchange Bank v. Hubbard*, 10 C. C. A. 295, 62 Fed. 112; *Hubbard v. Bank*, 18 C. C. A. 525, 72 Fed. 234; *Mason v. Dousay*, 35 Ill. 424, 85 Am. Dec. 368; *Bissell v. Lewis*, 4 Mich. 450. But see *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956.

⁶⁶ *Akers v. Demond*, 103 Mass. 318; *Dunscomb v. Bunker*, 2 Metc. (Mass.) 8; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. Ed. 245; *Adams v. Robertson*, 37 Ill. 45; *Orr's Adm'r v. Orr*, 157 Ky. 570, 163 S. W. 757. There is much conflict as to whether if the contract is to be performed in another country its laws determine the validity. See 2 Ames Cas. Bills & N. 255, note 1, and cases collected. Mr. Daniel so states the law. Daniel, Neg. Inst. § 868. Compare *R. S. Oglesby Co. v. Bank of New York*, 114 Va. 663, 77 S. E. 468.

it took its inception as a contract, must be determined by the law of the state where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offense against the laws of Massachusetts. * * * But when a usurious or other illegal consideration is declared by the laws of any state to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that state, but void in every state and everywhere." ⁶⁷ The harshness of the rule in regard to usury is, however, modified by the qualification that if the rate of interest would be lawful at the place of payment the parties may elect as to the law by which the contract is to be governed; and conversely if the rate of interest would be usurious at the place of payment, but is not usurious at the place where the instrument was made, the instrument may be held valid.⁶⁸ A bill or note void for want of a stamp is void everywhere, although if the stamp is merely a condition of its admissibility in evidence the requirement will have no effect without the jurisdiction.⁶⁹

Same—Interpretation and Obligation of Contract

The law of the place where the contract is made also governs the nature, interpretation, and obligations of the various contracts of the parties, except that where the con-

⁶⁷ Akers v. Demond, 103 Mass. 323, per Wells, J.

⁶⁸ Harvey v. Archibald, 1 Ryan & M. 184; Depau v. Humphreys, 8 Mart. N. S. (La.) 1; Potter v. Tallman, 35 Barb. (N. Y.) 182; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Vilet v. Camp, 13 Wis. 198; Miller v. Tiffany, 1 Wall. (U. S.) 310, 17 L. Ed. 540; McKay's Estate v. Belknap Savings Bank, 27 Colo. 50, 59 Pac. 745; Rand. Com. Paper, §§ 43, 44. See R. S. Oglesby Co. v. Bank of New York, 114 Va. 663, 77 S. E. 468.

⁶⁹ Alves v. Hodgson, 7 Term R. 241; Bristow v. Sequeville, 5 Exch. 275; Fant v. Miller, 17 Grat. (Va.) 47. If the performance is to be in another county, it may be that the absence of a stamp would be immaterial. Daniel, Neg. Inst. § 915. The Bills of Exchange Act (section 72, subd. 1, a) enacts that where a bill is issued out of the kingdom, it is not invalid by reason that it is not stamped according to the law of the place of issue.

tract is to be performed in another place the law of that place governs.⁷⁰

Accordingly the nature of the instrument, as negotiable or non-negotiable, is as a rule determined by the place where it is made.⁷¹ Thus a promissory note payable to bearer, made in England, is transferable by delivery in France, although by the law of France transfer by delivery be inoperative.⁷² And when a note was made in Mississippi, where the maker might set up equitable defenses against a bona fide holder, and was transferred in Louisiana, it was held in an action in that state by the indorsee that the maker was entitled to the defenses allowed by the former state, his obligations having been contracted in the light of its law.⁷³ So where a note was made in Scotland payable to A., and hence not negotiable by English law, but negotiable by Scotch law,

⁷⁰ Andrews v. Pond, 13 Pet. (U. S.) 65, 10 L. Ed. 61; Frentiss v. Savage, 13 Mass. 21; Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; Hyde v. Goodnow, 3 N. Y. 268; Brownell v. Freese, 35 N. J. Law, 285, 10 Am. Rep. 239; Thorp v. Craig, 10 Iowa, 461; Brown v. Worthington, 162 Mo. App. 508, 142 S. W. 1082 (N. I. L.); Daniel, Neg. Inst. § 867; Rand. Com. Paper, § 31. "The general principle is that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it." Akers v. Demond, 103 Mass. 323, per Wells, J. Applying this general principle, the weight of authority in this country is that the interpretation and obligation of the drawer's or indorser's contract are governed by the law of the place of drawing or indorsing, that being considered also the place of performance. Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450 (N. I. L.); Raymond v. Holmes, 11 Tex. 54; Thorp v. Craig, 10 Iowa, 461. There is some authority, however, to the effect that the law of the place of payment of the principal obligation on the bill or note should govern. Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Minor, Conflict of Laws, § 165. See note 80, p. 250, *infra*.

⁷¹ De La Chaumette v. Bank, 2 Barn. & Adol. 385; Robertson v. Burdekin, 1 Ross, Lead. Cas. 812; Ory v. Winter, 4 Mart. N. S. (La.) 277; Woods v. Ridley, 11 Humph. (Tenn.) 194. Compare Mackintosh v. Gibbs, 79 N. J. Law, 40, 74 Atl. 708 (N. I. L.).

⁷² De La Chaumette v. Bank, 2 Barn. & Adol. 385.

⁷³ Ory v. Winter, 4 Mart. N. S. (La.) 277.

and was indorsed in England, it was held by the Scotch court that the maker could not object to the form of transfer, inasmuch as it was according to the law which determined the nature of the instrument.⁷⁴ If, however, a note be not negotiable according to the law of the place where it is payable, it will be held non-negotiable, although negotiable according to the law of the place where it was made.⁷⁵

It follows from what has been said that the liability of the maker of a note is governed by the law of the place where it is made, and of the acceptor of a bill by the law of the place where it is accepted, unless in either case the instrument is payable elsewhere, in which case the law of the place of payment will control. This principle regulates the time of payment, for example the number of days of grace, if any, to which the acceptor or maker is entitled.⁷⁶ A strong il-

⁷⁴ Robertson v. Burdekin, 1 Ross, Lead. Cas. 812.

⁷⁵ Freeman's Bank v. Ruckman, 16 Grat. (Va.) 126; Bombolaski v. First Nat. Bank (Ind. App.) 101 N. E. 837. Compare Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787. In Bell v. Riggs, 34 Okl. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111, it was held that where a mortgage given as security for the payment of a note provided that the note and mortgage should be governed by the law of Oklahoma, although the note was payable in Kansas, as against a holder of the note and mortgage the question whether or not the note was negotiable was to be decided according to the law of Oklahoma. In Hardy v. Lamb (Tex. Civ. App.) 152 S. W. 650, the Court of Civil Appeals of Texas held that the question whether or not an instrument was negotiable is not governed by the latest decision of the highest court of the territory where the instrument was executed, payable and transferred to the plaintiff; but, in the absence of a statute in such territory clearly answering the question, is governed by the decision of the forum as to what the law merchant is, independently of statute. It is submitted that this decision is erroneous.

⁷⁶ Washington Bank v. Triplett, 1 Pet. (U. S.) 25, 7 L. Ed. 37; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550; Blodgett v. Durgin, 32 Vt. 361; Walsh v. Dart, 12 Wis. 635. It is held, also, that the law of the place of payment determines whether or not the payment complies with the order of the drawee. Thus where the drawee of a negotiable bill, a bank in Austria, which bill was payable in Austria to the order of the payee, paid same on a forged indorsement, it was held that such drawee properly charged the drawer with the amount paid. Casper v. Kuhne, 159 App. Div. 389, 144 N. Y. Supp. 502.

lustration is found in a case where a bill, drawn in England, was accepted by the drawees in Paris, and before the day of payment, owing to the outbreak of the Franco-Prussian war, the French government passed a law prolonging the time of protest on negotiable instruments signed before its promulgation and postponing the time of payment, and it was held in an action by the indorsee against the drawers that presentment for payment in accordance with this law was sufficient.⁷⁷

The liability contracted by the drawer and by the indorser is different from that of the acceptor and maker in that the former undertake to pay only in the event of dishonor and upon receiving due notice. They contract to pay at the place of drawing or of indorsement respectively, and their contracts are hence governed by the law of the place where their contracts are entered into.⁷⁸ Thus where the defense of failure of consideration was available to the drawer according to the law of Mississippi where the bill was drawn, but not according to the law of Louisiana where the drawee resided, it was held that the drawer was entitled to the defense.⁷⁹ And as there may be many indorsements, each made in a different state, a series of contracts of indorsement may arise, each governed by the law of a different state, and all differing in effect one from another.⁸⁰ It is to be observed, however, that while the liability of the indorser as against his immediate and subsequent indorsees upon his contract of indorsement is governed by the law of the place of the indorsement, a different question is pre-

⁷⁷ Rouquette v. Overmann, L. R. 10 Q. B. 525.

⁷⁸ As pointed out in note 70, p. 248, supra, this is the view supported by the weight of authority. But see Minor, Conflict of Laws, § 165.

⁷⁹ Wood v. Gibbs, 35 Miss. 560.

⁸⁰ Williams v. Wade, 1 Metc. (Mass.) 82; Violett v. Patton, 5 Cranch, 142, 3 L. Ed. 61; Trabue v. Short, 18 La. Ann. 257; Ingersoll v. Long, 4 Dev. & B. (20 N. C.) 436; Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79. The desirability of avoiding this result is a strong reason in favor of the rule applied in Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867, that the law of the jurisdiction in which the bill or note is made payable should govern. See note 70, p. 248, supra.

sented as to the effect of the indorsement as a transfer and in conferring rights upon the transferee and subsequent holders against the original parties. As to the effect of the indorsement as a transfer there has been great diversity of opinion. According to the majority of English decisions the rights of the indorsee or transferee by delivery against the original parties are governed by the law of the place where the prior contract was made or to be performed.⁶¹

By the place where the contract is made is meant, as be-

⁶¹ Robertson v. Burdekin, 1 Ross, Lead. Cas. 812; Trimbey v. Vignier, 1 Bing (N. C.) 151; Lebel v. Tucker, L. R. 3 Q. B. 77; Bradlaugh v. De Rin, L. R. 5 C. P. 473. "It has been held that on a bill drawn and payable in England, but indorsed in France in form invalid there, but valid by English law, the indorsee might maintain suit in England against the acceptor, whose contract is to be interpreted by English law; but as between the indorsee and the indorser, such indorsement would confer no right of action, being governed by the law of France, the *lex loci contractus*. In Bradlaugh v. De Rin the exchequer chamber held that in * * * Lebel v. Tucker and Trimbey v. Vignier the French law had been mistaken, and that as regards the point raised—i. e., the right of an indorsee under a blank indorsement to sue in his own name—there was no conflict between the laws of France and England, but the principles laid down in those cases are not questioned." Benj. Chalm. Bills & N. 71, note. These three cases are severely criticised by Prof. Ames, who maintains that upon principle the transfer of a bill is governed by the law of the place where it is at the time of transfer. 2 Ames Cas. Bills & N. 807, 808. See Daniel, Neg. Inst. §§ 903-907. The latter is the view taken in Embiricos v. Anglo-Austrian Bank [1905], 1 K. B. 677. The Bills of Exchange Act (section 72, subd. 2) provides that the "Interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom." In Embiricos v. Anglo-Austrian Bank, *supra*, Vaughan Williams, L. J., said: "It is to be observed that our decision in the present case does not increase the liability of the bank upon which the cheque was drawn and which paid the cheque. I wish to add that I am not satisfied that, having regard to the terms of subsection 2 of section 72 of the Bills of Exchange Act, 1882, that section is conclusive of the present case, and I do not think that section 24 governs the case of an indorsement abroad." Compare Levy v. Levy, 78 Pa. 507, 21 Am. Rep. 35. The view stated in the text seems in accord with the cases holding that the negotiability of an obligation is determined by

tween the original parties, the place where it is delivered or issued, not where it is dated,⁸² but the place of date is *prima facie* the place of issue, and as against a bona fide purchaser the instrument will be deemed to have been made at that place.⁸³

Same—Damages

The rate of interest payable as damages⁸⁴ is determined by the law of the place of performance: in case of the acceptor or maker where the instrument is payable;⁸⁵ in case of the drawer and indorser, where the contract of indemnity is to be performed,—that is, at the place of drawing or indorsing. Thus where F. in California drew bills on B. in Washington, D. C., which were not accepted, and the payee brought suit in England against the drawer, and it appeared that the California rate of interest was 25 per cent., and the Washington rate 6 per cent., it was held that the plaintiff was entitled to recover interest at the higher rate.⁸⁶ It would logically follow that in case of dishonor the drawer or indorser upon receiving due notice would be liable to pay in performance of his contract of indemnity whatever interest had then accrued against the acceptor or maker according to the law of the place of dishonor; but that if the drawer or indorser failed upon receiving notice to make

the law of the place of performance. See *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281.

⁸² *Cook v. Moffat*, 5 How. 295, 12 L. Ed. 159; *Lawrence v. Bassett*, 5 Allen (Mass.) 140; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Brownell v. Freese*, 35 N. J. Law, 286, 10 Am. Rep. 239; *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Briggs v. Latham*, 36 Kan. 255, 13 Pac. 398, 50 Am. Rep. 546; *National Exch. Bank of Baltimore v. Rook Granite Co.*, 155 N. C. 43, 70 S. E. 1002 (N. I. L.); *Jamieson v. Potts*, 55 Or. 292, 105 Pac. 93, 25 L. R. A. (N. S.) 24 (N. I. L.); *Smith v. Dixon*, 150 App. Div. 571, 134 N. Y. Supp. 1097 (N. I. L.).

⁸³ *Snaith v. Mingay*, 1 Maule & S. 87; *Lennig v. Ralston*, 23 Pa. 139.

⁸⁴ As to the distinction between interest by way of damages and stipulated interest, ante, p. 230, note 2.

⁸⁵ *Cooper v. Earl of Waldegrave*, 2 Beav. 282; *Scofield v. Day*, 20 Johns. (N. Y.) 102; *Austin v. Imus*, 23 Vt. 288; *Hawley v. Sloo*, 12 La. Ann. 815; *Rand. Com. Paper*, § 41.

⁸⁶ *Gibbs v. Fremont*, 9 Exch. 25.

such payment he would thereafter become liable to pay interest by way of damages for the breach of his contract at the rate in force in the place where he was liable to perform it.⁸⁷ The cases, however, generally fail to take the distinction between the interest payable by the drawer or indorser in performance and the interest payable by him as damages upon breach, and lay down the rule broadly that the rate of interest payable by the drawer is determined by the law of the place where the bill was drawn, and of the indorser by the law of the place where the instrument was indorsed.⁸⁸ The same rules apply where there is a conflict of laws as to the damages payable in lieu of re-exchange.⁸⁹

Same—Lex Fori

The *lex fori* governs the remedy, and determines the form of action, in whose name action must be brought, the time within which action may be brought, questions of the admissibility of evidence, and the like. Where the foreign law is relied upon, it must be alleged and proved as a fact.⁹⁰

⁸⁷ This distinction is pointed out by Prof. Ames. 2 Ames Cas. Bills & N. 819.

⁸⁸ Gibbs v. Fremont, *supra*; Crawford v. Branch Bank at Mobile, 6 Ala. 15, 41 Am. Dec. 33; Bailey v. Heald, 17 Tex. 102; *Ex parte Heidelback*, 2 Low. 526, Fed. Cas. No. 6,322; Daniel, Neg. Inst. § 920; Chalm. Bills & N. art. 222. It has been held, however, in Vermont that the place of payment of the note governs. Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205. And see Minor, Conflict of Laws, § 165.

⁸⁹ Slacum v. Pomery, 6 Cranch, 221, 3 L. Ed. 205; Lennig v. Ralston, 23 Pa. 187; Hendricks v. Franklin, 4 Johns. (N. Y.) 119.

⁹⁰ As to conflict of laws in respect to presentment, protest and notice of dishonor, see post, p. 471.

CHAPTER VI

TRANSFER

- 84. Definition.
- 85. Validity Between Immediate Parties.
- 86. Methods of Transfer.
- 87. By Assignment.
- 88. By Operation of Law.
- 88a-89. By Negotiation.
- 90-90a. Negotiation by Indorsement.
- 91. By Delivery.
- 92. Overdue Paper.
- 92a. Right to Sue.

DEFINITION

84. The transfer of a bill or note is either the assignment or devolution of the right to its enforcement.

Thus far we have been considering the two classes of contracts embodied in negotiable bills and notes. They are the contract embodied on the face of the bill and of the note, and the contract embodied in their acceptance and in their indorsement. We have examined the elements necessary to constitute each of those classes of contracts, and the nature and extent of the obligations that were assumed by their parties. And, because in this work we have only sought to apply these rules to negotiable bills and notes, in the outset we examined and discussed negotiability, its peculiar immunities, and the reasons for it, and in what ways negotiable instruments were distinguished from non-negotiable ones.

The present chapter opens a new phase of the subject. The past chapters have sought to explain principally the legal rules which govern and the relations which are created by the fundamental contracts upon which the law of negotiable instruments rests. The future chapters seek to explain the rules which courts have enforced in the trans-

fer of instruments, and particularly with reference to their circulation as an equivalent for money. The underlying problem before courts in laying down these rules has been to determine what was sound policy for a circulating medium, and also what was just and equitable where interests and rights of parties to the instrument conflict. In this last respect the problem differs accordingly as the parties may have contracted directly with each other or as they may have acquired rights against other parties by virtue of the transfer of the instrument. For, as we have seen, in many instances parties by the transfer of the instrument become liable to or acquire rights against others of whom they have no knowledge or with whom they have had no business transactions. And since most relations of contract depend upon the theory that rights are acquired or liabilities are assumed by virtue of the express or the implied agreement of the person enforcing the right or against whom the right is enforced, it is obvious that some system different from that of the ordinary rules of contract must be developed. This system we shall examine by first investigating the nature of transfer, then the common defenses which arise in the circulation of the instrument and their effect in case of immediate and remote parties, and lastly the unique position in contract of the purchaser for value without notice.

VALIDITY BETWEEN IMMEDIATE PARTIES

85. As between immediate parties or parties privy, any cause which would invalidate an ordinary contract will invalidate the contract created by the transfer.

A negotiable instrument containing indorsements is an aggregate of independent contracts. It often evidences as many distinct business transactions as there are contracts. Each distinct transaction may be widely different from every other. And the legal relations of the parties created by every individual transaction may be as widely different

as the transactions themselves are distinct. Ordinarily, the instrument itself shows the parties who participated in a single transaction. They are technically spoken of as "immediate parties." Parties who participated in different transactions are called "remote." Ordinarily, too, the instrument itself shows to which class these parties belong. The maker and payee of a note,¹ the drawer and acceptor of a bill,² the indorser and immediate indorsee of a note or bill,³ the drawer and payee of a bill,⁴ are immediate parties. The indorsee and maker of a note,⁵ or the indorsee and one who is not his immediate indorser,⁶ are remote parties. And the conclusion to be drawn from the instrument itself is that the maker and payee of a note, for instance, participated in one transaction, while the third and fourth indorsers participated in another, and perhaps a widely different one. This is merely a presumption, however, and not of very much effect. Sometimes the instrument does not show who are the immediate and who the remote parties. In such cases the ostensible and real relations of the parties may be shown. Thus, where a note was both made and indorsed for accommodation of the plaintiff and then delivered to him, the court said that the real relation of the parties could be shown, and that the lack of consideration between them was a complete de-

¹ *Puget de Bras v. Forbes*, 1 Esp. 117; *Jefferies v. Austin*, 1 Strange, 674; *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. 834.

² *Thomas v. Thomas*, 7 Wls. 476.

³ *Easton v. Pratchett*, 1 Cromp., M. & R. 798; *Holliday v. Atkinson*, 5 Barn. & C. 501. This was an action on a promissory note indorsed without consideration, and brought by the indorsee after death of the giver, against the executors, and the decision was against an action lying in such case, there being no legal consideration. *Abbott v. Hendricks*, 1 Man. & G. 791; *Klein v. Keyes*, 17 Mo. 326.

⁴ *McCulloch v. Hoffman*, 10 Hun (N. Y.) 133. In this case, in which plaintiff was payee and defendant was drawer, it was held competent to prove certain facts and circumstances of Hoffman's signature, and that the subject of consideration might be inquired into, since the action was between the original parties.

⁵ *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; *Chemical Electric Light & Power Co. v. Howard*, 148 Mass. 359, 20 N. E. 92, 2 L. R. A. 168.

⁶ *Etheridge v. Gallagher*, 55 Miss. 464.

fense.⁷ The mere position of these parties on the paper, as not immediate, does not in fact make them so. And the true nature of the transaction can be given in evidence.

It once being determined whether the parties to an instrument between whom there is controversy are immediate or remote, it then becomes clear whether the general rules of law applicable to contracts, or the peculiar rules and equitable theories applicable to negotiable bills and notes, apply. If the parties are immediate, and the controversy is between them as parties to a distinct contract, then any defense which is sufficient to prevent the enforcement of an ordinary contract will prevail.⁸ To them the theories of the purchaser for value do not apply, for it is no part of the theory of negotiability that it should give immunity to the person who has procured the instrument through fraud or misrepresentation or duress, or through an illegal consideration, or who has found or stolen it. Negotiability, as a theory, only aims to protect innocent parties, who have taken the instrument in ignorance of the

⁷ Powers v. French, 1 Hun (N. Y.) 582. See THOMPSON v. CLUB-LEY, 1 Mees. & W. 212, Moore Cases Bills and Notes, 136. But in an action brought by the indorsee of a note against his indorser, who had indorsed for the accommodation of the maker, it is no defense that the plaintiff gave no value for the indorsement. Miller v. Terrier, 7 U. C. Q. B. 540. And in an action brought by the bearer of a negotiable promissory note payable to bearer it is no defense that the defendant executed the note for the accommodation of third parties and that the defendant delivered the note to the plaintiff, the plaintiff having paid no value at any time for the delivery. Muir v. Cameron, 10 U. C. Q. B. 356.

⁸ N. I. L. § 58. Lack of consideration: N. I. L. § 28; Murphy v. Keyes, 39 N. Y. Super. Ct. 18; Wilson v. Ellsworth, 25 Neb. 246, 41 N. W. 177; Kulenkamp v. Groff, 71 Mich. 675, 40 N. W. 57, 1 L. R. A. 594, 15 Am. St. Rep. 283; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336. But see Re King's Estate, 94 Mich. 411, 54 N. W. 178; Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Hodgkins v. Moulton, 100 Mass. 309; Black v. Ridgway, 131 Mass. 80. Duress: CLARK v. PEASE, 41 N. H. 414, Moore Cases Bills and Notes, 152. Fraud: Vathir v. Zane, 6 Grat. (Va.) 246; Rogers v. Morton, 12 Wend. (N. Y.) 484. Illegality: Edmunds v. Groves, 2 Mees. & W. 642; Cummings v. Boyd, 83 Pa. 372; Wright v. Irwin, 33 Mich. 32; Bierce v. Stocking, 11 Gray (Mass.) 174. Loss or theft: Millis v. Barber, 1 Mees. & W. 425.

existence of these defenses, affecting some contract embodied in the instrument before the innocent party takes it. Therefore an immediate party to a contract who has been guilty of fraud, misrepresentation, and duress must suffer as against him upon whom he has committed such a wrong.

In general, where the parties are remote, then the theories of negotiability apply. The fact of importance in the doctrine of negotiable instruments is the presumption in favor of the purchaser for value without notice necessary to preserve the instrument as a circulating medium.⁹ The remote party is one who knows nothing of the facts of defense which have arisen between immediate parties. He has not contracted with them, and is ignorant of their transactions. He is to be protected in paying money or giving value for the instrument from the wrong other parties have committed. The wrong which has tainted their contract does not vitiate his. He stands in the position of one fortified by the doctrines of equity, who will be pro-

⁹ It was held in an anonymous case that where a bank bill payable to A or bearer was lost, and was afterwards found by X, and was by him passed over to Y for value, who got a new bill from the bank in his own name, an action in trover for the first bill would not lie against Y. 1 Ld. Raym. 738. An action was brought against the acceptor by an indorsee, and the defendant offered to prove the drawer's name forged, but it was held that such proof would not be a defense against an acceptance which gave credit to the bill. Jenys v. Fawler, 2 Strange, 946. A note was made payable to J. C. in consideration of money given to be used in gambling, and indorsed by J. C. to the plaintiff for value. It was held that the plaintiff could not recover, even though he had no notice of the use to which the money had been put. Bowyer v. Bampton, Id. 1155. But see p. 314, note 87, *infra*. In Grey v. Cooper, an action by indorsee against the drawer of a bill, payable to W., who in turn indorsed it to another, and which finally came into possession of plaintiffs by indorsement, it was pleaded in defense that the payee was an infant. Held that the drawer was charged, on the ground that, according to the bill, he engaged to pay to the order of the payee, whoever that might be. 3 Doug. 65. In Smith v. Chester, it was held that an indorsee, in an action against an acceptor, must prove the handwriting of the first indorser, as a bill would be no payment to the one in whose favor it was drawn, unless indorsed by him. 1 Term R. 654.

tected by courts, because the loss was not occasioned by his act, but rather that of some prior party of whom he knows nothing.¹⁰

METHODS OF TRANSFER

86. There are three methods of transfer:

- (a) By assignment.
- (b) By operation of law.
- (c) By negotiation.

SAME—BY ASSIGNMENT

87. A bill or note may be transferred by assignment, or sale, as distinguished from negotiation, subject to the same conditions that would be requisite in the case of an ordinary chose in action.¹¹

We have already seen that transfers in the form of words commonly used for an assignment when written on the bill or note are construed as indorsements and not as assignments, unless the intention between the parties plainly is to treat them as an assignment in distinction from an indorsement.¹² But where a bill or note, which can only be transferred by indorsement, is delivered without indorsement, yet with intention to give the transferee the right to sue, as we shall see in the later sections of this chapter, the right to sue vests by assignment.¹³ The legal effect of assignment differs from the legal effect of the

¹⁰ N. I. L. § 57. See Chapter VIII.

¹¹ Chalmers' Dig. Bills (7th Ed.) 143. See N. I. L. §§ 49, 58..

¹² See p. 152, supra.

¹³ Examples are: An order by the payee of a note on the maker to pay over the proceeds to some one. *Noyes v. Gilman*, 65 Me. 589, semble. A transfer of a note or bill by deed. *McClain v. Weidemeyer*, 25 Mo. 364. An assignment by a separate writing. *Morris v Pollon*, 50 Ala. 403. An order by a holder to his collecting agent to pay over the proceeds. *Gayoso Sav. Inst. v. Fellows*, 6 Cold. (Tenn.) 467.

passing of the legal title by negotiation. And this raises the question of the rights conveyed by assignment.¹⁴

The effect of the assignment of an ordinary contract right is that the party holding the right drops out of the contract and another takes his place. The assignee is substituted in place of the assignor. And that the student may better understand the matter, we will say that the assignee, and every subsequent person to whom the contract comes by assignment, may be considered as the person who made the contract in the first instance, and as having said and done everything in making the contract which the original assignor said or did. Hence if the original assignor said or did something which under the ordinary law of contracts would prevent him from enforcing the contract, or asserting his right against the other party to the original contract, the assignee, although he knows nothing of the original transaction, may be deemed to have said and done the same things. And further, if any subsequent assignee from whom, as an assignor, the holder in turn derives the contract, has done anything to prevent its enforcement against the original party, the last holder cannot enforce it against the original party. Each assignee takes his chances as to the exact position in which any party making an assignment of it stands.¹⁵ He takes the contract subject to

¹⁴ It was once held that a bill payable to A. or bearer was not negotiable. *Hodges v. Steward*, 1 Salk. 125; *Nicholson v. Sedgwick*, 1 Ld. Raym. 180. But these cases have been overruled. *Grant v. Vaughan*, 3 Burrows, 1516. See *Daniel, Neg. Inst.* § 104. Before the passing of the statute 3 & 4 Anne, c. 9, a promissory note was held not assignable or indorsable over within the custom of merchants. *Buller v. Crips*, 6 Mod. 29. See *ante*, p. 7. As to whether inland bills only were contemplated by this statute, see *Milne v. Graham*, 1 Barn. & C. 192. In the case of *Lodge v. Phelps*, the question arose as to whether the assignee of a promissory note given in Connecticut, where such assignee could not maintain an action in his own name, might so maintain such action in New York. It was held that the action might be brought in the assignee's own name, but allowing the defendant every defense to which he would have been entitled in New York. 2 *Caines, Cas. (N. Y.)* 321.

¹⁵ *Crouch v. Credit Foncier*, L. R. 8 Q. B. 386; *Mangles v. Dixon*, 3 H. L. Cas. 735; *Littlefield v. Albany County Bank*, 97 N. Y. 581; *Calanan v. Edwards*, 32 N. Y. 483; *Kleeman v. Frisbie*, 63 Ill. 482;

equities; that is, to defenses to the contract which would avail in favor of the original party up to the time of the notice of the assignment given to the person against whom the contract is sought to be enforced. The effect of an assignment in this respect thus differs from the effect of negotiation, for the chief difference between an assignment and a negotiation is that the negotiable contract can be enforced by the transferee, without previous notice to the contractor, and without the risk of being met by defenses which would have been good against the assignor.

SAME—BY OPERATION OF LAW

88. The full title to a bill or note passes, without assignment or negotiation, by operation of law, in the following cases:

- (a) Upon the death of the holder, when the title vests in his personal representative, or
- (b) Upon the bankruptcy of the holder, when the title vests in his assignee, or
- (c) At common law, if the holder is an unmarried woman, upon her subsequent marriage, when the title vests in her husband, or
- (d) At common law, if a bill or note be made payable or be transferred to a married woman, when the title vests in her husband, or
- (e) Upon the death of a joint payee or indorsee, when the title vests at once in the survivor or survivors.

By "operation of law" is meant that in the cases above specified the law implies a transfer where there is none by act of the parties. The rules of law themselves effect the transfer. The position, rights and liabilities of executors and administrators and trustees have been already suffi-

Willis v. Twambly, 13 Mass. 204; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Lane v. Smith, 103 Pa. 415; Shade v. Creviston, 93 Ind. 591; Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65. But by statute in many states the assignee may sue in his own name. See, for example, Gamble v. Malsby (Fla.) 64 South. 437.

ciently explained.¹⁶ The position, rights, and liabilities of an assignee in bankruptcy are similar to theirs, because in most respects he is but an ordinary trustee.¹⁷ As regards the position of married women at common law, there is not much to be said, because in England and in almost all our states the common law has been abrogated by statutes abolishing most of the old rules. These rules were that at common law a married woman, though she might have contracted as feme sole, was nevertheless by marriage disabled from acquiring the benefits under the contract. These belonged conditionally to her husband. If he reduced them to possession, they were his absolutely. If he did not reduce them to possession, on his death they survived to her if alive, but, if dead, to her representatives. These rules were operative in case of bills and notes whether made payable to or indorsed to a married woman. And during the marriage, the husband was for all purposes deemed to be the holder of the instrument payable to the order of the wife, whether it was made payable to her before or after marriage. As regards the joint payee or indorsee, the rule stated in the text is the statement of the contract rule of survivorship, perhaps the principal characteristic of the doctrine of joint right. By this is meant that the order in the bill or indorsement and the promise in the note are made to all the promisees, not as separate individuals, but as one legal entity. We may liken them, in their being but one party in ownership, to a corporation, which may be composed of many individuals, yet acts as one, and which in case of the death of some of its members still exists and acts through the survivors. So with joint payees or indorsees, the right does not descend to representatives, but passes on or is transferred to the survivors, who have the title to it and are entitled to enforce it.

¹⁶ *Ante*, p. 90. Upon death of the holder, the title vests in his executor or administrator. *Stone v. Rawlinson*, Willes, 559; *Rand v. Hubbard*, 4 Metc. (Mass.) 256. Even if the bill or note be specifically bequeathed. *Bishop v. Curtis*, 21 Law J. Q. B. 391; *Crist v. Crist*, 1 Ind. 570, 50 Am. Dec. 481.

¹⁷ Title vests in assignee. *Smith v. De Witts*, 6 Dowl. & R. 120; *Daniel*, Neg. Inst. § 280.

The title, in all these cases, received by the transferee, is only that held by the transerrer, because this devolution of interest by operation of law is but an assignment of that interest. The executor, administrator and assignee in bankruptcy merely stand in the place of the original owner and can have no better position than he had.¹⁸ They pay nothing for the paper, neither do they take it in any commercial transaction, but it comes to them as part of the holder's property, to be collected and paid over to the creditors of the holder or persons entitled to it. And this also is the principle governing in the reduction to possession by a husband of the choses in action of a wife,¹⁹ and in the case of the survivor of joint owners.²⁰

SAME—BY NEGOTIATION

- 88a. "Negotiation" means transfer of a bill or note in the form and manner prescribed by the law merchant, with the incidents and privileges annexed thereby.²¹
89. There are two modes of negotiation: (a) Negotiation by indorsement, and (b) negotiation by delivery. The form of the instrument determines which mode is applicable.²²

The effect of "negotiation" has already been somewhat discussed, and will be further considered hereafter. The incidents and privileges of negotiation may be briefly capitulated as follows: (1) The transferee can sue all parties to the instrument in his own name. (2) Consideration for the transfer is *prima facie* presumed. (3) The transerrer can, under certain conditions, give a good title, although he has none himself. (4) The transferee can further negotiate the bill, with like privileges and incidents.²³

¹⁸ Billings v. Collins, 44 Me. 271.

¹⁹ Daniel, Neg. Inst. §§ 257, 258.

²⁰ Daniel, Neg. Inst. §§ 1182, 1183, 1183a.

²¹ N. I. L. § 80.

²² N. I. L. § 80. ²³ N. I. L. §§ 51, 24, 57, 191 (par. 7).

NEGOTIATION BY INDORSEMENT

90. A bill or note which is in legal effect payable to order is negotiated by indorsement.²⁴
- 90a. The transferee of an instrument made payable to order without indorsement is the equitable owner, and takes it subject to all the equities vested in prior parties.

The facts which determine whether or not the instrument is negotiable by indorsement are the terms of the face of the instrument. If the instrument be to order, then it was in contemplation of the parties that the money called for was to be paid to the payee, or to some person to whom he would direct it to be paid.²⁵ It would be a violation of the terms of the contract to pay it otherwise. For the meaning of the words "or order" is that the original parties intended in the first place that the instrument might pass from the payee to some person, they did not know whom, and on again from him to another, who in turn might transfer it. They therefore may be deemed to promise to pay its amount to any one whatever, provided only that such person can show an order for its payment. And thus, as we have seen (see *ante*, p. 172), it is immaterial whether the indorsement contains words of negotiability or not.²⁶ But the only method by which this order can be evidenced is an indorse-

²⁴ N. I. L. § 30.

²⁵ N. I. L. § 30; *German-American Nat. Bank v. Lewis* (Ala. App.) 63 South. 741 (N. I. L.); *Cock v. Fellows*, 1 Johns. (N. Y.) 143; *Hedges v. Sealy*, 9 Barb. (N. Y.) 214. A note by R. B. & A. G., payable to J. B., was indorsed thus: "Pay the within to J. R. [Signed] J. B." It was held that the legal ownership of the note was not transferred to J. R. by this indorsement, so as to authorize him to maintain a suit upon the note in his own name against the makers. *Robinson v. Brown*, 4 Blackf. (Ind.) 128. In some states, by statute, words of negotiability are not required. See *Rand. Com. Paper*, § 174.

²⁶ N. I. L. § 36 (last par.); *More v. Manning, Comyns*, 311; *Edie v. East India Co.*, 1 Wm. Bl. 295, 2 Burrows, 1216; *Leavitt v. Putnam*, 3 N. Y. 494, 53 Am. Dec. 322.

ment,²⁷ although the indorsement may have various forms, and be made sometimes by the payee or indorsee and sometimes by persons upon whom their interests devolve.²⁸ And the words or order are construed as an express power given the payee to assign only in case the payee evidences his assent to the transfer by his indorsement.²⁹

There is a large class of cases where, through accident, forgetfulness, mistake, or some other cause, a negotiable instrument is transferred in good faith, but without the indorsement of the person to whose order it is made. It is

²⁷ In the case of *Bryant v. Eastman*, where one who was carrying on business for himself, but in the name of a company which had not been organized, though incorporated, received as payment for a debt due him in such business a note payable to the order of the company, it was held that such person might transfer the note by indorsing it in his own name. 7 *Cush.* (Mass.) 111. *Warder, Bushnell & Glessner Co. v. Gibbs*, 92 Mich. 29, 52 N. W. 73; *Rand. Com. Paper*, § 700; *Byles, Bills & N.* pp. 2, 151; *Daniel, Neg. Inst.* §§ 663, 664.

²⁸ The various forms are arranged as follows: (1) If payable to A. or order, A. must indorse. (2) If payable to A., and he is dead, B., as executor of A., must sign. Thus, in the case of *Stone v. Rawlinson*, it was held that the executor or administrator of a person to whom or whose order a bill is payable has the absolute property in such bill, and may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name. *Willes*, 559. In such case the indorsement of one of several executors is good. *Sanders v. Blain*, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86. But if payable to A., B., C., and D., executors of A., all must sign. *Johnson v. Mangum*, 65 N. C. 146; *Smith v. Whiting*, 9 Mass. 334. But see *Daniel, Neg. Inst.* § 266. (3) If payable to A., and he is bankrupt, B., as assignee of A., must sign. *Smith v. De Witts*, 6 Dowl. & R. 120. (4) If payable to A., wife of B., B. must sign. *Mason v. Morgan*, 2 Adol. & E. 30; *Cotes v. Davis*, 1 Camp. 485. (5) If payable to A., B., C., and D., a copartnership, any member may sign by the firm name. See *N. I. L.* § 41. Thus, a note, made payable to E. & R. or order, was indorsed by R. in his own name to his partner E. It was held that E. could not maintain an action as payee, since the indorsement must be in the partnership name. *Estabrook v. Smith*, 6 Gray (Mass.) 570, 66 Am. Dec. 443. (6) If payable to A., B., C., and D., not partners, all must sign. *N. I. L.* § 41. Thus, a bill payable to father and son, not partners, was indorsed by the son alone. Such indorsement was held not good, as both payees should have indorsed. *Carrick v. Vickery*, 2 Doug. 653, note.

²⁹ *Nicholson v. Sedgwick*, 1 Ld. Raym. 180; *Hodges v. Steward*, 1 Salk. 125.

true that an indorsement of an instrument and an assignment of it such as we have been endeavoring to explain are widely distinct. An indorsement is a negotiation, and carries with it the legal title, and the assignment carries with it only the equitable one.⁸⁰ The transferee stands in the position of an assignee. He owns the note. He, in turn, may transfer it, but he owns it and transfers it subject to the rules applicable in case of an assignment of any other chose in action.⁸¹ And although he subsequently obtains

⁸⁰ *Freund v. Importers' & Traders' Nat. Bank*, 76 N. Y. 352; *U. S. v. White*, 2 Hill (N. Y.) 59, 87 Am. Dec. 374; *Baker v. Moran* (Or.) 136 Pac. 30. Under N. I. L. § 49, a transferee for value without indorsement may sue in his own name, as he gets "legal title" notwithstanding N. I. L. §§ 30, 31. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83 (N. I. L.); *Swenson v. Stoltz*, 36 Wash. 818, 78 Pac. 999, 2 Ann. Cas. 149 (N. I. L.), semble. But he takes the note subject to all equities available against his transfer. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879 (N. I. L.); *Landis v. White Bros.*, 127 Tenn. 504, 152 S. W. 1031 (N. I. L.). See *Johnston County Sav. Bank v. Scroggin Drug Co.*, 152 N. C. 142, 67 S. E. 253, 136 Am. St. Rep. 821 (N. I. L.). After a transfer for value without indorsement, the transfer cannot maintain an action on the instrument. *Bank of Bromfield v. McKinley*, 53 Colo. 279, 125 Pac. 493 (N. I. L.).

⁸¹ *Sublette v. Brewington*, 139 Mo. App. 410, 122 S. W. 1150 (N. I. L.), semble, and *Marling v. Fitzgerald*, 188 Wis. 93, 120 N. W. 388, 23 L. R. A. (N. S.) 177, 131 Am. St. Rep. 1003 (N. I. L.), are contra. The opinion expressed in the first, and the decision in the latter, of these cases, however, cannot be supported. See *Brannan*, Anno. N. I. L. (2d Ed.) pp. 51, 52, 40. N. I. L. § 49, probably would not deprive the transferee for value of an accommodated payee of the right to hold the maker or acceptor, since the real reason why the accommodated party cannot sue the accommodating party is that recovery would lead to a circuiting of action, and hence accommodation as against a transferee for value is, properly speaking, not an equity. Prof. Ames criticised N. I. L. § 49, as apparently providing that "the transferee even for value of an accommodated payee could not hold the maker, which would be unjust and contrary to the American cases." *Brannan*, Anno. N. I. L. (2d Ed.) p. 50. See *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254 (N. I. L.); *First National Bank of Salem v. Grant*, 71 Me. 374, 36 Am. Rep. 334; *Renwick v. Williams*, 2 Md. 356. Under B. E. A. § 81 (same as N. I. L. § 49), it was held, however, that the transferee could sue the accommodating party, where there had been value paid, even though the accommodated party had not indorsed. *Hood v. Stewart*, 17 Session Cases (4th

an indorsement,⁸² if he has in the meantime acquired knowledge of the equities,⁸³ or if the indorsement be after maturity,⁸⁴ he still holds the instrument subject to the same defenses. In the language of the Negotiable Instruments Law,⁸⁵ "for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

There is, indeed, some authority to the effect that if it was the intention of the parties that the instrument should be indorsed, but the indorsement was omitted through accident, mistake, or fraud, the indorsement, when subsequently obtained, will relate back to the time of the delivery, and operate as if then given, the holder standing as a bona fide purchaser as of that date.⁸⁶ But it is doubtful, to say the least, whether any such exception can be reconciled with principle. The governing principle is that, in order that a purchaser may take title discharged of equities, three things must concur: (1) *Bona fides*, (2) the giving of value, and (3) the transfer of the legal title. In the cases which fall within this supposed exception, when the legal title is subsequently acquired the essential element of *bona fides* is wanting. Indeed, it is questionable whether these cases

Series) 749 (Scotland). If the maker of a note payable to his own order transfers it for value without indorsement, the transferee cannot charge the maker on the note. *Market & Fulton Nat. Bank v. Ettenson's Estate*, 172 Mo. App. 404, 158 S. W. 448 (N. I. L.), semble. Compare *Walters v. Neary*, 21 T. L. R. 146 (B. E. A.), where the drawer-payee of an accepted bill was charged by his transferee for value without indorsement.

⁸² As to the kind of indorsement to which the transferee is entitled, see *Seeley v. Reed* (C. C.) 28 Fed. 164.

⁸³ *Whistler v. Forster*, 14 C. B. (N. S.) 248, 1 Ames Cas. Bills & N. 341, 345, note 1 (citing cases); *LANCASTER NATIONAL BANK v. TAYLOR*, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70, *Moore Cases Bills and Notes*, 144; *Clark v. Whitaker*, 50 N. H. 474, 9 Am. Rep. 286; *Osgood's Adm'r's v. Artt* (C. C.) 17 Fed. 575.

⁸⁴ *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711; *Lyon, Potter & Co. v. First Nat. Bank*, 29 C. C. A. 45, 85 Fed. 120.

⁸⁵ N. I. L. § 49.

⁸⁶ *Daniel, Neg. Inst.* § 745, citing *Southard v. Porter*, 43 N. H. 380; *Watkins v. Maule*, 2 Jac. & W. 237; *Hughes v. Nelson*, 29 N. J. Eq. 547. See, also, *Tied. Com. Paper*, § 248; *Benj. Chalm. Bills & N.* 119.

can be distinguished, even upon the facts, from the cases which have established the rule, as these cases generally arose from mistake or accident in failing to obtain at the time of delivery the indorsement which it was evidently the intention of the parties should be made. In the leading case of *Whistler v. Forster*,⁸⁷ for example, the payee of a check made by the defendant, and obtained from him by the payee by fraud, gave it to the plaintiff for value, but did not then indorse it, and upon the want of an indorsement becoming apparent, the plaintiff went to the payee, and obtained his indorsement. It was held that the plaintiff took subject to the defense of fraud. Erle, C. J., said: "According to the law merchant, the title to a negotiable instrument passes by indorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value, and without notice of any fraud. The plaintiff's title under the equitable assignment here, therefore, was to be rendered valid by the indorsement; but at the time he obtained the indorsement he had notice that the bill had been fraudulently obtained by Griffiths from the defendant, and that Griffiths had no right to make the indorsement." It is difficult to see how, in the cases supposed to fall within the exception, the transferee could acquire any greater rights than were acquired by the plaintiff in this case, or why in the one case, as in the other, the rights of the transferee must not be subject to the equities of the defendant.⁸⁸

SAME—BY DELIVERY

91. A bill or note which is in legal effect payable to bearer is negotiated by delivery without indorsement.

Bills and notes payable to bearer and bills and notes indorsed in blank are, in legal effect, the same. The con-

⁸⁷ 14 C. B. (N. S.) 248.

⁸⁸ A bank discounting a note not indorsed by the payee takes it subject to all defenses, though such indorsement was omitted by mistake, and was supplied after the paper matured. *Lyon, Potter & Co. v. First Nat. Bank*, 29 C. C. A. 45, 85 Fed. 120.

tract in the case of the note payable to bearer imports that the maker or acceptor is willing to pay any one who may have it in his lawful possession. The indorsement in blank signifies the same thing with regard to an indorser making it. And the holder of both an instrument payable to bearer and one indorsed in blank may transfer the instrument without indorsement.³⁹ Such a transfer is a negotiation, but except to the extent of the warranties already specified (see *supra*, p. 217) it imposes no liability upon the transferrer; for bills made payable to bearer are negotiable at common law, and notes so made payable are recognized by the statute of Anne;⁴⁰ and bills or notes to pay A or bearer are interpreted to be contracts to pay the person so mentioned, or the person to whom he may deliver the instrument. The phrase "bearer" is *descriptio personæ* for the legal possessor,⁴¹ and the transfer of title according to the terms of the original instrument is therefore predicated upon delivery alone. "The courts," says Mr. Daniel,⁴² "treat notes payable to bearer as if there were a direct line of contract between the maker and the holder, by whatever successive stages of transfer he may have derived it; and it is correct to hold that the maker is in direct contract with him, provided he becomes the bearer bona fide. He need not trace title through his predecessors, as possession is presumptive evidence of his right." But it is evidently the intention of the courts to construe this contract subject to the implied condition that the maker or acceptor will pay only the bona fide possessor. In other words, the

³⁹ N. I. L. §§ 9 (subd. 5), 30, 34; *Hale v. Citizens' Bank of Monette* (Ark.) 163 S. W. 775. See p. 154, *supra*.

⁴⁰ In *De La Chaumette v. Bank of England* it appeared that a certain bank note had been stolen, and afterwards came into the possession of a party in France, who, in the course of business, sent the same to England. By the desire of the one from whom the note had been stolen, it was converted by the bank. In an action of trover, it was decided that by the statute of Anne such notes were negotiable, just as were inland bills, and thus delivery to a bona fide holder for consideration gave a good title as against original holder. 2 Barn. & Adol. 385.

⁴¹ *Grant v. Vaughan*, 3 Burrows, 1516.

⁴² Daniel, *Neg. Inst.*, footnote to § 729.

original parties may be deemed to say, "We will not restrict the payment of this instrument to any particular person, but will pay it to anybody,"⁴³ provided such person be the bona fide holder." They therefore may be deemed to contract that the instrument may be transferred subject to the rights and immunities of the transfer of an instrument transferred by negotiation, and that the transferee should have rights of an indorsee for value and without notice, so far as the admission of equities is concerned.⁴⁴ And the only difference between the transferrer by delivery and the indorser is that the transferrer, by declining to indorse, declines to enter into a contract of indemnity, and the transferee relies on the instrument itself, and upon the implied warranties, by not requiring an indorsement. The transferrer, unless he violates an implied warranty, cannot therefore be compelled to refund the money for which he sold the bill or note if it prove uncollectible. Of this fact the transferee takes the risk on himself,⁴⁵ for he might by requiring an indorsement, acquire all the right acquired by an indorsee.⁴⁶ But in other respects he derives the benefit of all the rights his transferrer or prior parties have acquired; he derives any benefit that may come from a purchase in due course for value and without notice, and thus is freed from liability to defenses.⁴⁷

⁴³ Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. Ed. 437; Town of Thompson v. Perrine, 106 U. S. 593, 1 Sup. Ct. 584, 588, 27 L. Ed. 298; Thompson v. Lee County, 8 Wall. 327, 18 L. Ed. 177.

⁴⁴ City of Lexington v. Butler, 14 Wall. 293, 20 L. Ed. 809; Moran v. Commissioners of Miami County, 2 Black, 722, 17 L. Ed. 342; Mercer County v. Hackett, 1 Wall. 83, 17 L. Ed. 548; James v. Chalmers, 6 N. Y. 209; Beach v. Wise, 1 Hill (N. Y.) 612; Bedell v. Carll, 33 N. Y. 581.

⁴⁵ Fenn v. Harrison, 8 Term R. 759; Fydell v. Clark, 1 Esp. 447; Emly v. Lye, 15 East, 7; Bank of England v. Newman, 1 Ld. Raym. 442. In this case it was held that: "If a man has a bill payable to him or bearer, and delivers it over for money received, without indorsement of it, this is a plain sale of the bill, and he who sells it does not become a new security; but, if he had indorsed it, he had become a new security, and then he had been liable upon the indorsement." Holt, C. J.

⁴⁶ Bigelow v. Colton, 13 Gray (Mass.) 309, 74 Am. Dec. 633.

⁴⁷ Miller v. Race, 1 Burrows, 452; MAURAN v. LAMB, 7 Cow.

OVERDUE PAPER

92. Negotiable paper may be transferred by indorsement or delivery when overdue.

A bill or note does not lose its negotiability by dishonor;⁴⁸ and yet, as regards parties prior to the transfer, many of the privileges of a bona fide holder who receives the paper after maturity are destroyed.⁴⁹ Defenses of payment, of fraud, of illegality and failure of consideration,⁵⁰

(N. Y.) 174, *Moore Cases Bills and Notes*, 148; *Grant v. Vaughan*, 3 Burrows, 1516. See, also, Daniel, Neg. Inst. § 814, and cases quoted; also section 4, c. 87, § 1191 et seq.

⁴⁸ N. I. L. § 47; *Pensacola State Bank v. Melton* (D. C.) 210 Fed. 57. An overdue promissory note is still negotiable within a statute exempting from attachment negotiable promissory notes. *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192, 64 Atl. 681 (N. I. L.). In the case of *Leavitt v. Putnam* it was held that, if originally negotiable, a bill or note does not lose such character by being dishonored, but may still pass from hand to hand ad infinitum until paid by the drawer. The indorser, after maturity, writes in the same form, and is bound only upon the same conditions of demand upon the drawer and notice of nonpayment, as any other indorser. Thus, the paper retains the main attributes of a proper bill or note. In *Deuters v. Townsend* it was held that a bill was assignable after maturity, and even after an action had been begun upon the same. 5 Best & S. 613. In *Ames v. Merriam* it was decided that the rule controlling bills or promissory notes, with respect to equities attaching, does not apply to checks on a bank, taken within a short time after their date. Although payable on demand, they are not treated as being dishonored or overdue on the day, or immediately after the day, of their date. In this case it was held that a check dated January 2d and delivered to a person on January 12th was not overdue and subject to defenses between original parties. 98 Mass. 294; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 18 N. E. 75; Johns. Cas. Bills & N. 45; *Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. Rep. 662. See p. 443, *infra*.

⁴⁹ N. I. L. §§ 52 (subd. 2), 58; *McCaffrey v. Dustin*, 43 Ill. App. 34, Johns. Cas. B. & N. 144.

⁵⁰ N. I. L. §§ 28, 55, 58. See collated cases, footnote to 1 Ames Cas. Bills & N. p. 747. In *Brown v. Davies* it was held that an overdue note taken with notice of nonpayment on it was subject to the defense of payment by the maker, on the ground that its being so

in favor of the original parties, may be successfully interposed in an action on a bill or note brought by the transferee of overdue paper when they would have availed against his transferrer. As Professor Ames points out, a negotiable instrument overdue becomes a mere assignable chose in action.

There are some things to be noted concerning overdue paper viewed as a chose in action. Prominent among these is the fact that it is transferred by indorsement or delivery, as the case may be, and not by assignment.⁵¹ The reason for this is that the parties to the original contract contemplated a payment to order. An indorsement signifies that order, and transfers the instrument. In *Colt v. Barnard*⁵²

noted for nonpayment when the plaintiff received it should have put him on inquiry. 3 Term R. 80. It was held in *Crossley v. Ham* that the plaintiff, by taking a note after dishonor by nonacceptance, took subject to infirmities and defenses between previous parties. 13 East, 498. See N. I. L. § 52, subd. 2. In *Ashurst v. Royal Bank of Australia* it was held that where a note was indorsed by one who was bankrupt at the time, and when overdue, the indorsee takes no better title than that of his transferrer. 27 Law T. 168; *Howard v. Ames*, 3 Metc. (Mass.) 308; *Bond v. Fitzpatrick*, 4 Gray (Mass.) 89; *Fish v. French*, 15 Gray (Mass.) 520. It is very generally held, however, that paper transferred after maturity is not subject to set-off or counterclaim available against the transferrer. Thus in the leading case of *Burrough v. Moss*, 10 Barn. & C. 558, Bailey, J., said: "The indorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and not to claims arising out of collateral matters." And this rule has been applied even where the transferee had notice of the set-off. *Oulds v. Harrison*, 10 Exch. 572. The English rule has been widely followed in this country. *First National Bank v. Texas*, 20 Wall. 72, 22 L. Ed. 295, per Swayne, J.; *Robinson v. Lyman*, 10 Conn. 30, 25 Am. Dec. 52; *Renwick v. Williams*, 2 Md. 356; *Young v. Shriner*, 80 Pa. 463; *Richards v. Daily*, 34 Iowa, 427; *Haley v. Congdon*, 56 Vt. 65; *Sargent v. Southgate*, 5 Pick. (Mass.) 312, 16 Am. Dec. 409; *Robinson v. Perry*, 73 Me. 168; *Edney v. Willis*, 23 Neb. 56, 36 N. W. 300. Even where set-off is allowed, it does not extend to debts arising after the transfer. In some states the matter is regulated by statute. See, generally, Daniel, Neg. Inst. §§ 1435-1437; 4 Am. & Eng. Enc. Law (2d Ed.) 315 et seq.; 1 Ames Cas. Bills & N. 759.

⁵¹ 2 Ames, Bills & N. p. 853.

⁵² 18 Pick. (Mass.) 260, 29 Am. Dec. 584. In this case a note was indorsed by the defendant, who was the payee, to plaintiff, after

Chief Justice Shaw explains that each indorsement is in the nature of a new draft by which the holder orders the maker to pay the contents to the indorsee, not, indeed, when the instrument by its terms became due, but within a reasonable time. Other authorities deem it similar to an inland bill of exchange drawn by the indorser on the acceptor of the bill or the maker of the note, payable to the indorsee at sight or on demand. And, by analogy, the duty of the indorsee of such an instrument, if he would hold the indorser, is generally determined.⁵³ An indorser is liable as such if the holder performs his duty in demanding the payment in a reasonable time.⁵⁴ By this is meant such a time as would, from the particular circumstances of each case, be allowed in the general conduct of affairs by business men.

The indorsee of a negotiable bill or note after maturity takes the same, and only the same, interest that his indorser had.⁵⁵ This is because it is a mere assignable chose in action. He buys the right of action which the indorser had to sell. He buys not only the right of its enforcement, but also the defenses which the original parties may have

maturity. There was no evidence of demand of payment on the maker, or of notice to the defendant. The maker was insolvent when the indorsement was made, and had absconded to New York, in which state a judgment had been obtained against him, which was unsatisfied. It was held that without demand and notice the action could not be maintained.

⁵³ N. I. L. § 7 (last par.); Byles, Bills, p. 169, note; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622.

⁵⁴ N. I. L. §§ 7 (last par.), 71; Berry v. Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267; Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322. "Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the persons so issuing, accepting or indorsing it, payable on demand."

⁵⁵ In Pine v. Smith, it was decided that one who takes a promissory note indorsed on the last day of grace does so subject to all defenses available in the hands of the payee, and in a suit against the maker the defendant may prove any illegality in the origin of the note. 11 Gray (Mass.) 38. A mortgage given to secure a note for the payment of four installments was taken when one installment was due and not yet paid. It was held that, in a suit to foreclose, the defendant might prove duress as a defense to the

to it.⁶⁶ To give expression to common business phrase, he buys a lawsuit for whatever it is worth, with the chances of its success or failure, as events may turn. The reason, as will be shown under the subject of "Notice," is that, when an indorsee takes an instrument overdue, it is presumed he was acquainted with, or had notice of, the circumstances which would affect the validity of it as against original parties⁶⁷ had it been in the hands of the person who was the holder at that time.⁶⁸ He cannot be treated as a purchaser without notice, because the fact that the instrument has not been paid when the acceptor or maker promised it should be paid implies that there is some reason on their part for its nonpayment. And whether he has inquired for this reason or not is immaterial. He should have made such inquiry, and the law will hold him to have made it. He is charged with notice of all facts and defenses he would have found out had he made the inquiry.⁶⁹

whole note. The note was dishonored by non-payment of the first installment, and this put plaintiff on inquiry. *Vinton v. King*, 4 Allen (Mass.) 562. In an action by the indorsee against the maker of a note for \$55, it was held that the defendant might show, under a plea of non-assumpsit, that he had given the payee \$50 shortly after the assignment, which the latter had agreed to credit on the note. The note in this case was payable on demand, and was negotiable two and a half months after date. *Losee v. Dunkin*, 7 Johns. (N. Y.) 70, 5 Am. Dec. 245. See, also, the case of *Holmes v. Kidd*, 3 Hurl. & N. 891. As to negotiability of a note payable on demand after the lapse of a reasonable time, see *Brooks v. Mitchell*, 9 Mees. & W. 15. As to burden of proof in case of transfer after maturity, see *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873; *Tyler v. Young*, 30 Pa. 144.

⁶⁶ N. I. L. § 58; *Folsom v. Bartlett*, 2 Cal. 163; *Wheeler v. Barret*, 20 Mo. 573; *Morgan v. United States*, 113 U. S. 500, 5 Sup. Ct. 588, 28 L. Ed. 1044; *Harrell v. Broxton*, 78 Ga. 129, 3 S. E. 5; *Money v. Ricketts*, 62 Miss. 209; *Speck v. Pullman Palace Car Co.*, 121 Ill. 57, 12 N. E. 213; *Church v. Clapp*, 47 Mich. 257, 10 N. W. 362; *Wood v. McKean*, 64 Iowa, 18, 9 N. W. 817; *Marsh v. Marshall*, 53 Pa. 396; *Hays v. Kingston* (Pa.) 16 Atl. 745.

⁶⁷ *Hayward v. Stearns*, 39 Cal. 58; *Way v. Lamb*, 15 Iowa, 79; *Etheridge v. Gallagher*, 55 Miss. 458.

⁶⁸ *Williams v. Matthews*, 3 Cow. (N. Y.) 252.

⁶⁹ *Fisher v. Leland*, 4 Cush. (Mass.) 456, 50 Am. Dec. 805; *Hinckley v. Union Pac. Railroad Co.*, 129 Mass. 61, 37 Am. Rep. 297;

It follows, conversely, from the rule that the transferee after maturity takes the interest of his transferor, that, if defenses are not available against the transferor or indorser of the overdue paper, then the transferee or indorsee is protected against them. If the right of action is perfect in the transferor or indorser, the transferee or indorsee buys that right of action, and all of it.⁶⁰ It is immaterial that indorsers and transferors prior to the indorser after maturity had notice, and were not in the position of the bona fide holder. If the indorser after maturity was a bona fide holder for value, the instrument was good in his hands, and was free from these defenses. A part of his title to the instrument was his power of transferring to others with the same immunity. At the first bona fide negotiation, all defenses between original parties and parties having notice cease to be valid.

In some jurisdictions, as we have seen,⁶¹ the fact that paper is accommodation paper, without other reason, constitutes a defense when that paper is transferred when overdue. This is, indeed, opposed to the law as laid down in England and in many cases in other jurisdictions, which declare that it is not to be inferred from the fact that paper is given for accommodation that there is any agreement not to negotiate it after maturity.⁶² There is, however, a criti-

Marsh v. Marshall, 53 Pa. 396; *Greenwell v. Haydon*, 78 Ky. 333, 39 Am. Rep. 234; *Kellogg v. Schnaake*, 56 Mo. 137; *Simpson v. Hall*, 47 Conn. 417.

⁶⁰ N. I. L. § 58; *Hascall v. Whitmore*, 19 Me. 102, 36 Am. Dec. 738; *Chalmers v. Lanlon*, 1 Camp. 383. In this action by indorsees of a bill of exchange against the acceptor, one of the grounds of defense was that the bill had been accepted for a debt contracted in a smuggling transaction, and though indorsed for value, before maturity, to a bona fide holder, yet that it had been indorsed by him to the present plaintiffs after maturity. It was held, however, that if the bill was received from one who might maintain an action upon it, the fact that indorsement was after maturity would not let in such defense. *Smith v. Hiscock*, 14 Me. 449; *Solomons v. Bank*, 13 East, 135, note; *Miller v. Talcott*, 54 N. Y. 114; *Britton v. Hall*, 1 Hilt. (N. Y.) 528.

⁶¹ Ante, p. 240.

⁶² *Charles v. Marsden*, 1 Taunt. 224. In this case it was held that, in an action by an indorsee for value against an acceptor, it was

cism to be made upon this doctrine. It came up before the English courts on questions of pleading, and it certainly seems not too much to say that the courts appear to have decided the matter without giving it a very thorough consideration. In *Sturtevant v. Ford* the judges held themselves bound by the principle of *stare decisis*, though they criticised the rule; and it is submitted, with deference to the weight of authority on the point, that the English doctrine, as it is followed in several states of the Union, is not the wiser view.

A reasonable presumption as to the intention of the parties would be rather that there was an understanding between them that the accommodated party should pay the bill or note when due, and hence that he should not use it after it became due; in other words, that the accommodation party intended to lend his credit only until maturity. If the instrument were transferred after maturity it would then be subject to the defense that it was used without authority.⁶⁸ This in no way varies the rule that, if the title to the accommodation paper when it becomes due has vested in a holder against whom the defense of want of consideration will not avail, then, on his transfer of the

no defense that the bill was accepted for the accommodation of the maker, and that the plaintiff knew this when he took the bill after maturity. The decision in *Stein v. Yglesias* also sustains the rule that a bill which has been accepted when overdue is good in the hands of one to whom it was transferred when overdue. 3 Dowl. 252; *MARLING v. JONES*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996 (N. I. L.), *Moore Cases Bills and Notes*, 139, First Nat. Bank of Salem v. Grant, 71 Me. 374, 36 Am. Rep. 334, and *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254 (N. I. L.) follow *Charles v. Marsden*. This will not be true, however, when the bill was accepted before maturity, and transferred afterwards, if there was an express or implied agreement between acceptor and the one accommodated that such bill should not be negotiated after maturity. *Sturtevant v. Ford*, 4 Man. & G. 101; *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Grant v. Ellicott*, 7 Wend. (N. Y.) 227; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Davis v. Miller*, 14 Grat. (Va.) 1; *Daniel, Neg. Inst.* § 786.

⁶⁸ *Chester v. Dorr*, 41 N. Y. 279; *Bower v. Hastings*, 36 Pa. 285; *Hoffman v. Foster*, 43 Pa. 137; *Battle v. Weems*, 44 Ala. 105; *Sears v. Moore*, 171 Mass. 514, 50 N. E. 1027.

paper after maturity, his assignee takes the title which he himself had. An accommodation party cannot raise the defense of want of consideration against a transferee of overdue paper who procured it from a bona fide holder, who, in his turn, acquired it before it became due.⁶⁴

RIGHT TO SUE

92a. The person to whom a bill or note is negotiated, or to whom it is transferred by operation of law, acquires the right to sue thereon in his own name.

As we have seen, while the equitable title to a bill or note is transferred by mere assignment, the legal title can be transferred only by negotiation or by operation of law. It follows upon principle that only the transferee by negotiation or by operation of law can maintain an action upon the instrument in his own name;⁶⁵ but, as will be seen, the authorities are by no means agreed upon this question. There is, indeed, no conflict of authority upon the proposition that where an instrument is in effect payable to order, and has not been indorsed in blank, only the original payee or the person to whom the instrument has been indorsed can maintain an action upon it.⁶⁶ It is in respect to instruments in effect payable to bearer that the authorities are in disagreement. The better view is that where an instrument is payable to bearer the action must be brought in the name of the original holder, or of some one to whom the

⁶⁴ Eckhert v. Ellis, 26 Hun (N. Y.) 663. See N. I. L. § 58.

⁶⁵ N. I. L. § 51. In an action brought by an indorsee or holder for collection in his own name, it is no defense that the plaintiff is not the beneficial holder. Craig v. Palo Alto Stock Farm, 16 Idaho. 701, 102 Pac. 393 (N. I. L.); Loeb v. Well (C. C. A.) 209 Fed. 608 (N. I. L.). See, also, R. M. Owen & Co. v. Storms & Co., 78 N. J. Law, 154, 72 Atl. 441 (N. I. L.). Where a promissory note was attached and sold under an execution, it was held that the purchaser could sue in his own name without an indorsement to him. Fishburn v. Londershausen, 50 Or. 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1234, 15 Ann. Cas. 975 (N. I. L.). Compare p. 268, note 30, supra.

⁶⁶ Daniel, Neg. Inst. § 692; 4 Am. & Eng. Enc. Law (2d Ed.) 842.

legal title has been transferred by delivery of the instrument.⁶⁷ This includes all persons who are rightfully in actual or constructive possession. Possession, actual or constructive, is necessary. Thus in *Emmett v. Tottenham*,⁶⁸ where the holder of a bill which had been indorsed in blank died, and his executor, not wishing his own name to appear, procured Emmett to bring action in his name against the acceptor, but did not deliver the bill until after action brought, it was held that the plaintiff, having neither actual nor constructive possession, could not maintain the action. But where the holder of a bill indorsed it in blank, and delivered it to A., it was held that A., B., and C. might maintain an action, the possession of A. being the possession of all.⁶⁹ Delivery for the purpose of enabling the transferee to sue is enough to constitute him a proper plaintiff.⁷⁰ Thus where the payee indorsed a bill in blank, and delivered it to the manager of a bank to cover advances by the bank, it was held that the manager might sue upon the bill. Byles, J., said: "To whomsoever the bill was intended to be indorsed, it clearly was perfectly indorsed. It could only have been intended to have been indorsed to the plaintiff or to his principals, the bank. If it was intended to be indorsed to the plaintiff *cadit quæstio*: if to the bank, inasmuch as the indorsement was in blank, it was competent

⁶⁷ N. I. L. §§ 30, 51, 191; *Emmett v. Tottenham*, 8 Exch. 884; *Coleman v. Biedman*, 7 C. B. 871; *Moore v. Maple*, 25 Ill. 341; *Watson v. President, etc., of New England Bank*, 4 Metc. (Mass.) 343; *Hovey v. Sebring*, 24 Mich. 232, 9 Am. Rep. 122. See 2 Ames Cas. Bills & N. 880.

⁶⁸ 8 Exch. 884.

⁶⁹ *Ord v. Portal*, 3 Camp. 239. Where a note is specially indorsed to A., he cannot strike out his name, and insert that of his vendee, and thereby enable the latter to maintain suit. *Grimes v. Piersol*, 25 Ind. 246.

⁷⁰ *Law v. Parnell*, 7 C. B. (N. S.) 282; *Lovell v. Evertson*, 11 Johns. (N. Y.) 52; *Haxton v. Bishop*, 3 Wend. (N. Y.) 13; *Guernsey v. Burns*, 25 Wend. 411; *Ancona v. Marks*, 7 Hurl. & N. 686; *Jenkins v. Tongue*, 29 Law J. Exch. 147; *Orr v. Lacy*, 4 McLean, 243, Fed. Cas. No. 10,589; *French v. Jarvis*, 29 Conn. 347; *Laflin v. Sherman*, 28 Ill. 391; *Lacoste v. De Armas*, 2 La. 263; *Southard v. Wilson*, 29 Me. 56; *Little v. O'Brien*, 9 Mass. 423; *Brigham v. Marean*, 7 Pick. (Mass.) 40; *Brigham v. Gurney*, 1 Mich. 349.

to them to hand over the bill to their agent or manager for the purpose of suing upon it on their behalf."⁷¹ On the other hand a few cases in the United States have held in effect that the holder of a bill or note payable to bearer could maintain an action thereon in the name of a stranger.⁷² For example, in New York,⁷³ where a note was payable to C. or bearer, and the holder and owner brought suit in the name of his transerrer without his knowledge or consent, it was held that the action could be maintained, the court saying that the owner had a right to insert over the blank indorsement any name he pleased, and that the person whose name was inserted would be deemed on the record the legal owner, and could sue as trustee for the real party in interest.

In many states the question in whose name action may be brought is affected by the enactments of the various Codes to the general effect that every action must be prosecuted in the name of the real party in interest, except that an executor, administrator, or trustee of an express trust may sue without joining with him the person for whose benefit the action is brought. The mere possessor of a bill or note, who has not the legal title or is not an assignee, is clearly not the real party in interest, and cannot in the Code states maintain an action as such upon it.⁷⁴ But the courts have construed this section to mean that it is still ordinari-

⁷¹ Law v. Parnell, 7 C. B. (N. S.) 282.

⁷² Gage v. Kendall, 15 Wend. (N. Y.) 640; Hartwell v. McBeth, 1 Har. (Del.) 363; Lewis v. Hodgdon, 17 Me. 267; Gray v. Wood, 2 Har. & J. (Md.) 328; Hodges v. Holland, 19 Pick. (Mass.) 43. In Robinson v. Crandall, the notes on which the action was brought were made by defendants, payable to H. W. or bearer. Upon death of payee the plaintiffs, his administrators, appointed in that state, declared in New York on the notes as bearers. It was held that, although the plaintiffs could not sue as foreign administrators, yet, being the real owners of the notes, they had the right to declare and recover as bearers, and that it did not lie with defendants to object to the plaintiffs' want of interest. 9 Wend. (N. Y.) 425.

⁷³ Gage v. Kendall, 15 Wend. (N. Y.) 640. The doctrine of Gage v. Kendall is no longer law in New York. HAYS v. HATHORN, 74 N. Y. 486, Moore Cases Bills and Notes, 149.

⁷⁴ Parker v. Totten, 10 How. Prac. (N. Y.) 233; Clark v. Phillips, 21 How. Prac. (N. Y.) 87.

ly no defense to a party sued upon commercial paper to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable or merely for the purpose of collection or to secure a debt contracted by an agent without sufficient authority. It is sufficient if the plaintiff have the legal title, either by written transfer or delivery, whatever be the equities between him and his assignor. But he must have the right of possession, and ordinarily be the legal owner. Such ownership may be as an equitable trustee, or it may have been acquired without adequate consideration, but it must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.⁷⁵ Thus a receiver may sue,⁷⁶ but an agent to collect may not, if he has neither the legal title nor authority to sue by assignment,⁷⁷ although, if the agent were named as payee in the note, he would be the trustee of an express trust.⁷⁸ But a donee may sue, because the legal title passes by gift, irrespective of the question of consideration;⁷⁹ or a person holding collaterals for the benefit of creditors, because the legal title passes by assignment, and he also is a trustee of an express trust;⁸⁰ and each and all of these persons may legally discharge the liability of the defendants upon the instrument.

⁷⁵ HAYS v. HATHORN, 74 N. Y. 486, Moore Cases Bills and Notes, 149; Eaton v. Alger, 47 N. Y. 345; Webb v. Morgan, 14 Mo. 428; Boyd v. Corbitt, 37 Mich. 52. See note 65, supra.

⁷⁶ Merchants' Loan & Trust Co. v. Clair, 36 Hun (N. Y.) 362.

⁷⁷ Iselin v. Rowlands, 30 Hun (N. Y.) 488; Rock County Nat. Bank of Janesville v. Hollister, 21 Minn. 385; Third Nat. Bank of Syracuse v. Clark, 23 Minn. 263. As to right of agent for collection to sue, see ante, p. 169, note 72. "A restrictive indorsement confers upon the indorsee the right * * * to bring any action thereon that the indorser could bring." N. I. L. § 37 (subd. 2). An indorsee "for collection" can sue in his own name, subject to equities against his indorser. He cannot show that he is part owner of the note, as that would contradict the indorsement. Smith v. Bayer, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858 (N. I. L.).

⁷⁸ Hollingsworth v. Moulton, 53 Hun, 91, 6 N. Y. Supp. 362; Hoxie v. Kennedy, 10 N. Y. St. Rep. 786.

⁷⁹ Pritchard v. Hirt, 39 Hun, 378.

⁸⁰ Nelson v. Edwards, 40 Barb. (N. Y.) 279.

CHAPTER VII

DEFENSES COMMONLY INTERPOSED AGAINST A PURCHASER FOR VALUE WITHOUT NOTICE

93. Real and Personal Defenses.
94-107. Real Defenses.
108-121. Personal Defenses.

REAL AND PERSONAL DEFENSES

93. The defenses interposed by a party to a bill or note in a suit brought by a holder against him are commonly of two classes:

- (a) **REAL**—Or those that attach to the instrument itself and are good against all persons.
(b) **PERSONAL**—Or those that grow out of the agreement or conduct of a particular person in regard to the instrument which renders it inequitable for him, though holding the legal title, to enforce it against the defendant, but which are not available against bona fide purchasers for value without notice.¹

The next two chapters develop, so far as can here be developed, the position in contract law of the purchaser for value without notice. He stands alone, in that the law will enforce his rights against certain defenses, which would avail against him were they interposed in any other kind of contract than a negotiable instrument. It is not sought to give a statement of all the defenses involved in cases of commercial paper. It is neither desirable nor possible to give an adequate statement of all the defenses which are interposed against even a bona fide holder. It is sought to classify only the common defenses, and to state the main rules concerning them, and the reasons for these rules.

¹ 2 Ames Cas. Bills & N. p. 812. The classification of Prof. Ames has been adopted. Id. p. 866.

In general, this classification shows that a bona fide holder can recover when the defense interposed is a personal defense, but cannot recover when the defense is real. In the case of immediate parties, all defenses are available, because each independent contract is governed by the general laws of contract. In the case of remote parties, where the holder enforcing the instrument is a purchaser for value without notice, a personal defense cannot be successfully interposed, and only the real defenses are allowed by the courts.

With real defenses the right sought to be enforced has never existed, or has ceased to exist. They are called "real defenses" because they attach to the res or thing, irrespective of the conduct or agreement of the parties to it. It cannot be enforced by the holder because there is no contract to enforce. Personal defenses, in contrast to this, are founded upon the act, conduct, or agreement of the parties with reference to the instrument. The instrument with them has a legal inception, and, as an instrument, is a binding obligation. But, as between immediate parties, the courts will not grant a remedy, because the plaintiff in the action—the party seeking its enforcement in the suit—has violated some right, or failed in some duty, so that he has no standing in court. Hence, while the instrument is in form a binding instrument, the person enforcing it has no rights which a court of justice will recognize. The reason for the failure in its enforcement is therefore not real, but personal. But remote parties stand upon another footing so far as personal defenses are concerned. The elements which distinguish them in legal theory from immediate parties are consideration and notice. In this the principle of the law merchant is the ancient principle of equity that where, in the transfer of title, a person has acquired a title and paid a valuable consideration without any notice of an equity actually existing in favor of another, the former may by that means obtain a perfect title, and holds the property freed from the prior outstanding equity.* "One who purchases a

* Pom. Eq. Jur. § 591; *Le Neve v. Le Neve*, 2 Amb. 436, 2 Lead. Cas. Eq. (4th Am. Ed.) 109.

legal title," says Professor Ames,⁸ "for value and without notice, takes the title discharged of all equities to which it was subject in the hands of his vendor. * * * For an equity, being in its nature a claim in personam, and not in rem, can be enforced only against a party to the transaction in which the equity arises, or some one in privity with that party. The transfer of bills and notes by virtue of their negotiability is governed by the same principle." A purchaser for value without notice, therefore, acquires a title free from so-called "personal" defenses.

SAME—REAL DEFENSES

94. Common real defenses are—

- (a) The incapacity of the defendant to make the contract.
- (b) Illegality, when the contract is declared void by statute.
- (c) The discharge of the instrument by alteration.

The incapacity of the defendant is usually due to infancy, coverture, lack of understanding, or incapacity of a corporation to contract.

INFANCY—A negotiable instrument or its indorsement made by an infant is voidable, not void.

It was the opinion of Lord Mansfield⁴ and of the bench of which Chancellor Kent was chief judge⁵ that a negotiable instrument given by an infant was void, even though it was given for necessaries. The reason upon which these great jurists and the judges who followed them⁶ based

⁸ 2 Ames Cas. Bills & N. p. 886.

⁴ Burgess v. Merrill, 4 Taunt. 468; Williamson v. Watts, 1 Camp. 552. In this case, Sir James Mansfield said: "This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to."

⁵ Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33.

⁶ McCrillis v. How, 3 N. H. 348; McMinn v. Richmonds, 6 Yerg. (Tenn.) 9; Morton v. Steward, 5 Ill. App. 533.

their opinion was that, if the instrument be valid as a negotiable one in the first instance, the consideration could not be inquired into when it came into the hands of a bona fide holder, and the infant would thereby be precluded from questioning the consideration. Thus, the instrument could not be voidable and remain negotiable. It must be either void or good.

This doctrine is certainly not now the law in its entirety. It is settled that between immediate parties, the infant being one, the instrument is voidable, and not void.⁷ This means that the infant may ratify or repudiate it, as he sees fit. But in case of remote parties the question is a more complicated one. The rule undoubtedly is, that a bill or note, to be negotiable, must be payable absolutely and at all events. And one argument is that, since an infant's bill or note is voidable and contingent upon his ratification of it, it cannot be negotiable. Yet it is admitted that if the infant, on his majority, choose to ratify the instrument to an indorsee, there is no reason why he should not be bound.⁸ The reasons of the text writers thus confronted with conflicting principles are not clear. On the one hand, there can be no doubt that the position of the purchaser for value without notice is inferior in grade of right to that of an infant. The purchaser cannot maintain that the contract, although voidable, nevertheless is still valid on reaching his hands, because not disaffirmed, and that, therefore, his equity is superior to that of the infant. In all of the cases where this doctrine has been applied to voidable contracts transferred to a bona fide transferee, its fundamental reason is laches, and laches is not allowed to prejudice an infant's rights. In analogous cases, too, the decisions of courts are against the purchaser for value without notice.

⁷ *Goodsell v. Myers*, 3 Wend. (N. Y.) 480; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Martin v. Mayo*, 10 Mass. 137, 6 Am. Dec. 103; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Reed v. Batchelder*, 1 Metc. (Mass.) 559; *Taft v. Sergeant*, 18 Barb. (N. Y.) 820; *Hodges v. Hunt*, 22 Barb. (N. Y.) 150.

⁸ *Hunt v. Massey*, 5 Barn. & Adol. 902; *Lawson v. Lovejoy*, 8 Greenl. (Me.) 405, 23 Am. Dec. 526; *Edgerly v. Shaw*, 5 Fost. (25 N. H.) 514, 57 Am. Dec. 349.

For example, the equity of such a purchaser in cases of personal property⁹ or of real property¹⁰ does not prevail against the right of the infant to rescind the contract. And a similar doctrine is probably applied to the purchaser for value of a negotiable instrument.¹¹ And thus the facts stand that the instrument cannot be negotiable, and yet it may vest by indorsement a perfect title in the transferee, and may be enforced provided the infant ratify it on coming of age; otherwise if he disaffirm it, and return the consideration. This rule does not include a bill or note given for necessaries, which is probably binding in every one's hands,¹² or cases when the infant himself does raise in his own behalf the point of non-age;¹³ and, of course, it does not apply where the infant ratifies the instrument on coming of age.

The infant, as an indorser, is no more liable than as maker or acceptor. His indorsement in such case is also voidable, and not void. This means not only that the infant is not liable upon the implied contract of indemnity unless he chooses to be; but, according to Judge Story,¹⁴ it means also that the infant may intercept the payment to the indorsee by disaffirming the contract, and returning the consideration, and recover the money called for in the instrument of the maker or acceptor. If the disaffirmance is made before payment to an indorsee, it is a defense against the indorsee. If made after payment, and the infant is payee, the acceptor or maker must pay the money twice, because they have warranted the capacity of the infant.

⁹ *Hill v. Anderson*, 5 Smedes & M. (Miss.) 216.

¹⁰ *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Jenkins v. Jenkins*, 12 Iowa, 195; *Miles v. Lingerman*, 24 Ind. 385; *Sims v. Smith*, 80 Ind. 577; *Buchanan v. Hubbard*, 96 Ind. 1.

¹¹ *Howard v. Simpkins*, 70 Ga. 322.

¹² *Earle v. Reed*, 10 Metc. (Mass.) 387; *Dubose v. Wheddon*, 4 McCord (S. C.) 221; *Haine's Adm'rs v. Tarrant*, 2 Hill (S. C.) 400. See, contra, *Trueman v. Hurst*, 1 Term R. 40; *Williamson v. Watts*, 1 Camp. 552. Compare *Re Soltykoff* [1891] 12 B. 413.

¹³ *Hastings v. Dollarhide*, 24 Cal. 185; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101.

¹⁴ Story, *Prrom. Notes*, § 80.

If parties prior to the infant receive notice of the infant's disaffirmance, they are discharged as to the parties subsequent to the infant, because these persons have lost their title to the paper by the avoidance of the indorsement, and they must look to their intermediate warranties to protect themselves. But, except as against himself, the indorsement is effectual as to all parties; and neither the maker, acceptor, nor any other party can refuse to pay the instrument on the ground that an intermediate indorser is an infant.¹⁵

95. COVERTURE—At common law a negotiable instrument or an indorsement made by a married woman was not voidable, but void.¹⁶ This rule has been modified by statutes in most jurisdictions.

The above is an enunciation of the rule of the common law, now almost obsolete. The reason for the rule wherever it exists is that, according to the former doctrine of the

¹⁵ Grey v. Cooper, 8 Doug. 65; Frazier v. Massey, 14 Ind. 382; Story, Prom. Notes, §§ 80-85; Tied. Com. Paper, § 49; Daniel, Neg. Inst. § 228. "The indorsement or assignment of the instrument by * * * an infant passes the property therein, notwithstanding that from want of capacity the * * * infant may incur no liability thereon." N. I. L. § 22.

¹⁶ In Chemical Nat. Bank of New York v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717, 5 Ann. Cas. 158, the note was indorsed in New Jersey by the defendant, a married woman, for the accommodation of her husband. The note was dated, "New York, June 7, 1898," and was payable in New York. By the law of New Jersey a married woman was not liable as an accommodation indorser unless it appeared that she or her separate estate had derived some benefit from the contract. The plaintiff, a banking corporation in the city of New York, there discounted the note in the ordinary course of business without notice that the indorser was a non-resident or that the indorsement was made in another state. It was held that the note as executed contained a representation that the indorser's contract was made in New York; that, therefore, as against the defendant it should be regarded as a contract made in New York, and that since, by the law of New York, a married woman had capacity to make such a contract, the plaintiff was entitled to recover. The court said: "While the contract made by an indorser is independent of that made by the maker, in the sense that

marriage relation, the wife merged her personality in that of her husband, and had therefore no capacity to contract apart from him. If a bill or note was made payable or indorsed to her before marriage, it became her husband's property on marriage; and if after marriage, then, by virtue of the operation of the law, it became her husband's. So a married woman could not indorse, not only because she had no capacity to do so, but also because the instrument was not hers to indorse, but was the property of her husband.¹⁷ But the legal relations of married women at the present day are changing. The statutes of the various states are constantly enlarging their property rights, and it

it is of a different nature, and can be separately enforced, still it is dependent on the promise of the maker, because it is an agreement to perform his promise upon certain conditions, if he does not. Therefore the place where the maker promised, as stated in the note itself, must with all the other provisions thereof be read into the promise of the indorser, and it thus becomes by fair presumption, in the absence of notice to the contrary, the place where the indorser promised also. The purchaser has no other guide as to a fact which may involve the validity of the contract, and hence it is a commercial necessity that both contracts, so closely connected that the second cannot exist without the first, should be presumed to have been made at the same place, unless the one with power so to do rebuts the presumption by timely notice. * * * But, to clinch the argument, we have only to refer to the Negotiable Instruments Law, which provides that: 'Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.' N. I. L. § 46.

¹⁷ Thus, in Connor v. Martin, 1 Strange, 516, where the plaintiff declared upon a promissory note made to a feme covert, and indorsed by her to him, judgment was given for the defendant, the right being in point of law vested in the husband, and the wife having no power to dispose of it. In Barlow v. Bishop, 1 East, 432, it was held that though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him (in the course of carrying on a trade in her own name by the consent of her husband), yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff. Where a bill of exchange was payable to a feme sole, who intermarried before the same was due, it was held that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill. McNeillage v. Holloway, 1 Barn. & Ald. 218. See N. I. L. §§ 22, 60, 61, 64, 65.

will, without doubt, soon be the law in most of the states of the Union that married women may contract in all respects as if single, and that coverture will be no defense to suits upon negotiable instruments.

96. **CORPORATIONS**—In the United States private corporations, unless restrained by charter, have capacity to draw, accept, make, and indorse bills and notes.
97. Where a corporation, having the legal capacity to make, accept, draw, or indorse negotiable instruments under certain circumstances, makes, accepts, draws, or indorses an instrument under such circumstances that such making, accepting, drawing, or indorsing is ultra vires, the corporation is, nevertheless, liable on the instrument at the suit of an indorsee, or, it seems, an assignee, for value without notice of such circumstances.
98. The indorsement or assignment of the instrument by a corporation passes the property therein, notwithstanding that from want of capacity the corporation may incur no liability thereon.¹⁸

A corporation is defined as an artificial being created by law, composed of individuals united into one body under a collective name, with the capacity of perpetual succession, and of acting as a natural person within the scope of its charter. It is one of the business methods by which men enlarge the effectiveness of property. For in business property or capital is the motive power; men's brains and hands the great machinery for earning money. And by the business contrivances of agencies, partnerships and corporations, a man's capital may be busy earning money in ways of which the owner knows nothing. The agent and partner is a man's other business self in the enterprise in which the agency or partnership is involved. But a cor-

¹⁸ This is the language of N. I. L. § 22. See, also, Chalmers Dig. Bills, art. 68.

poration is of a somewhat different character. Frequently a large number of persons having money whose investment they cannot personally supervise, aggregate their separate capitals in one enterprise, some furnishing more, some less, the capital being evidenced by what is called "stock," the owners being called the "stockholders." This aggregate capital is invested in given business enterprises, and employed in ways expressly formulated by legislatures. For the purpose of carrying out these legislative designs, officers are chosen by the stockholders from among their own number, called "trustees" or "directors," and from these in turn, generally, the administrative function is created, consisting of an executive called a "president" or a "secretary" or "managing agent," or some similar name, to supervise and direct the investment of the capital furnished by the stockholders, and execute generally the business of the corporation. The business of the corporation is not, however, carried on in the name of its administrative or executive officers, directors, or stockholders. The aggregate capital is created into a distinct legal being and becomes like an ordinary person in all its legal dealings. It takes a name of its own. It acts through the instrumentality of its executive officers, as though it had a mind of its own. And people buy from and sell to it, and contract with it, as though it were itself an acting sentient person.

The law which creates this artificial person makes it the authorized agent of the investing capitalist to do certain things only. These general purposes are found in its charter, which is the legislative act creating it, and is the commission of the corporation to do business. And it is fair to suppose that the only intention of the capitalist in investing his money in stock is that his money is to be devoted to carrying out the purposes of the incorporation, and nothing else, and that he intended by such investment only to get what proportionate profit his money earned, and incur a proportionate share of the total loss suffered in the enterprise. But for anything outside of this, he did not intend to be bound. Naturally, therefore, when any act is not within the scope of its charter, or the purposes of its

incorporation, the power of agency of the corporation ceases. In law phrase the act is "ultra vires." And because the individual stockholders, for whose collective body the corporation is but another name, and whose agent the corporation is, cannot be presumed to have intended to incur any liability not contemplated by its charter, and not necessary to carry on its business, such an act is void. Hence the meaning of the rules that a corporation has power to make such contracts as are either expressly or impliedly authorized by its charter or act of incorporation, or are necessary or not foreign to the carrying on of its business,¹⁹ but that it has no capacity to perform acts beyond these express or implied powers. Therefore an executory contract ultra vires is void. It can be enforced neither by nor against the corporation.²⁰

The power of a corporation to make contracts necessary to carry on its business implies that it may borrow money, make debts and issue negotiable paper for the purposes of its business.²¹ So that the rule is that wherever a corporation may contract a debt, it may draw a bill or give a note

¹⁹ Thomas v. West Jersey Co., 101 U. S. 82, 25 L. Ed. 950; Perrine v. Chesapeake & D. Canal Co., 9 How. 184, 13 L. Ed. 92; Metropolitan Bank v. Godfrey, 23 Ill. 579; Western Cottage Organ Co. v. Reddish, 51 Iowa, 55, 49 N. W. 1048; Richardson v. Massachusetts Charitable Mechanic Ass'n, 131 Mass. 174; Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95; Booth v. Robinson, 55 Md. 419; Wayland University v. Boorman, 58 Wis. 657, 14 N. W. 819; State v. Rice, 65 Ala. 83; Cleveland & M. R. Co. v. Himrod Furnace Co., 37 Ohio St. 321, 41 Am. Rep. 509; Curtis v. Leavitt, 15 N. Y. 64; Spear v. Crawford, 14 Wend. (N. Y.) 22, 28 Am. Dec. 513; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378; Rivanna Nav. Co. v. Dawson, 3 Grat. (Va.) 19, 46 Am. Dec. 183; Thompson v. Waters, 25 Mich. 222, 12 Am. Rep. 243; Moss v. Averell, 10 N. Y. 449; Aull Sav. Bank v. City of Lexington, 74 Mo. 104.

²⁰ Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; President, etc., of Bank of Michigan v. Niles, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14.

²¹ Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707; Moss v. Harpeth Academy, 7 Heisk. (Tenn.) 285; Rockwell v. Elkhorn Bank, 13 Wis. 653; Smith v. Eureka Flour Mills, 6 Cal. 1; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Curtis v. Leavitt, 15 N. Y. 9; Booth v. Robinson, 55 Md. 419; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

in payment of it.²³ It may also borrow money to pay the debt, and in furtherance of this may execute a bill or note to secure the borrowed money.²³ Also, it has power to take a bill or note for a debt due to it. And what it may receive, it may transfer.²⁴ And this means that instruments may be indorsed in full or in blank by corporations, including also the power to enter into the collateral contract which an indorser assumes.²⁵

The converse of these propositions is not what might be expected. The limit of the rule apparently is that, provided the corporation is not incapacitated from contracting, a bill or note, although ultra vires, is unenforceable only as between immediate parties; but a bill or any other negotiable security, which is not upon its face illegal and unauthorized, is valid in the hands of a purchaser for value without notice. The reason for this is, that one who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate pow-

²³ 1 Pars. Notes & B. 184, 185. The rule in England is not so broad. Chalm. Bills & N. art. 67.

²⁴ Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Safford v. Wyckoff, 4 Hill (N. Y.) 442; Moss v. Oakley, 2 Hill (N. Y.) 265; Mead v. Keeler, 24 Barb. (N. Y.) 20; Partridge v. Badger, 25 Barb. (N. Y.) 146; Hamilton v. Newcastle & D. R. Co., 9 Ind. 359; Came v. Brigham, 39 Me. 35; Clarke v. School Dist. No. 7, 3 R. I. 199; Buckley v. Briggs, 30 Mo. 452.

²⁵ Lucas v. Pitney, 27 N. J. Law, 221; McIntire v. Preston, 10 Ill. (5 Gilman) 48, 48 Am. Dec. 321; Hardy v. Merriweather, 14 Ind. 203.

²⁵ Bank of Genesee v. Patchin Bank, 13 N. Y. 309. The following is a portion of the opinion of Denio, J., in this case: "I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount, or for any other lawful purpose. In this respect it has the same right as any other holder of such paper. * * * The contract of indorsement is incident to the negotiation of mercantile paper, and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes." Marvin v. Hymers, 12 N. Y. 223; Planters' Bank v. Sharp, 6 How. 301, 12 L. Ed. 447. The power to indorse does not, as a rule, extend to accommodation paper. Bank of Genesee v. Patchin Bank, *supra*; National Bank of Commerce v. Atkinson (C. C.) 55 Fed. 465; Rand. Com. Paper, § 334.

er.²⁶ But when the paper is upon its face in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, and a bona fide holder for value receives it, he may enforce it against the corporation. He is not bound to inquire into such extrinsic fact. He is in no way apprised of it from the paper itself. And the

²⁶ This statement of the rule and the reason for it seems misleading. It is well settled that a corporation is liable for a tort, even though committed in the course of acts which are not expressly or impliedly authorized by the charter or incorporation laws. So, also, the corporation may by a misrepresentation of fact estop itself to deny the legality of a certain contract. Where a corporation has the implied power to make and indorse notes for certain purposes, the issuing or indorsing of such an instrument by the corporation is a representation that the making or indorsing were under such circumstances as to be within the powers of the corporation. Such a representation is a representation of the existence of certain facts peculiarly within the knowledge of the corporate officers, not of the extent of the corporate powers. In the case of a negotiable bill or note this representation is made to any person who becomes a holder of it. If such holder pays value for the instrument without being advised of the circumstances under which the instrument was made or indorsed by the corporation as against him the corporation is estopped to deny the presence of facts necessary to the legality of the instrument. Thus, where the bill or note is ultra vires, because given for the stock of another corporation, or for its accommodation, an indorsee of the instrument, who takes it for value and without notice, can recover its face amount from the corporation maker. Jefferson Bank of St. Louis v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641 (N. I. L.); National Bank of Commerce v. Sancho Packing Co., 186 Fed. 257, 110 C. C. A. 112 (N. I. L.); Johnson v. Johnson Bros., 108 Me. 272, 80 Atl. 471, Ann. Cas. 1913A, 1303; Knapp v. Tidewater Coal Co., 85 Conn. 147, 81 Atl. 1063 (N. I. L.); Gaston & Ayres v. J. I. Campbell Co., 104 Tex. 576, 140 S. W. 770, 141 S. W. 515; Willard v. Crook, 21 App. D. C. 237 (N. I. L.). In La Normandie Hotel Co. v. Security Trust Co., 38 App. D. C. 187 (N. I. L.), the court said obiter that under N. I. L. § 29, a corporation would be bound on its accommodation indorsement to a holder for value with notice of the character of such indorsement. But section 29 seems clearly to have been intended as a declaration of the rule that the single fact that the defendant signed for the accommodation of another party is not an equitable defense to an action on the instrument. Accordingly in Oppenheim v. Simon Reigel Cigar Co. (Sup.) 90 N. Y. Supp. 355, it was held that N. I. L. § 29, did not change the law as to accommodation indorsements by corporations.

burden should not be cast upon him of suffering loss under such circumstances, and it is not.²⁷ This rule applies both to making or accepting notes and bills and to their indorsement.²⁸ And of course its necessary implication is, that if the want of authority is known to the purchaser, the instrument or the indorsement is unenforceable against the corporation.

The general scope of this work does not admit of the discussion of interesting questions concerning commercial paper of public corporations, the execution of bills and notes by the agents of corporations, and lastly the character of acts within the power of corporations. For these the students must refer to more extensive treatises.

It remains under this head to speak of the effect of indorsements ultra vires upon the transfer of title. The rule is that an indorsement is a good transfer of the instrument, although for want of capacity the corporation may incur no liability as indorser.²⁹ The reason is that, to be an indorser, the corporation must be either the payee or an indorsee of the instrument. And being such payee or indorsee, the parties liable on the paper are estopped from pleading ultra vires, because they have made the paper payable to, or else have indorsed it to, the corporation, and have received its funds.³⁰ The defense of ultra vires is for the protection of the stockholders of a corporation, and not

²⁷ *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678.

²⁸ *Mechanics' Banking Ass'n v. New York & S. White Lead Co.*, 35 N. Y. 505. See, also, for general doctrine, *Bank of New York v. State Bank of Ohio*, 29 N. Y. 619; *Barker v. Mechanics' Fire Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Olcott v. Tioga R. Co.*, 27 N. Y. 548, 84 Am. Dec. 298; *Marshall County v. Schenck*, 5 Wall. 772, 18 I. Ed. 556; *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

²⁹ *Smith v. Johnson*, 3 Hurl. & N. 222; *Brown v. Donnell*, 49 Me. 421, 77 Am. Dec. 266. See N. I. L. § 22.

³⁰ See "Liabilities of Parties," ch. 5, §§ 77, 78, 79, *supra*. See N. I. L. §§ 22, 80, 81, 84, 85.

for the benefit of the other parties to the paper.⁸¹ It is like the defense of illegality of incorporation, which is not meant as an excuse for the nonpayment of indebtedness, but as a protection to those whose money is invested in the stock of the enterprise.⁸² Thus, the transfer, though ultra vires, transfers title, because prior parties are estopped from taking advantage of the defense. The principle of estoppel applies also to the corporation to the extent of precluding it from repudiating the transfer.

99. PERSONS NON COMPOS MENTIS—Total lack of understanding in persons non compos mentis or drunken is a defense to the enforcement of a bill or note, both as between immediate parties and as against a bona fide holder, when the party sought to be charged was an adjudged incompetent, unless, perhaps, the contract was fair and the other party had no knowledge of the lunatic's incompetency.

The views of courts are changing with reference to bills or notes, upon which persons non compos mentis have incurred an obligation. They are departing from a position which was sustained by consistent theory, but at the expense of justice and common sense. This theory was that such executory contracts would not be enforced by courts, because persons non compos mentis had no assenting mind, and therefore no capacity to contract,⁸³ and also because

⁸¹ Farmers' & Merchants' Ins. Co. v. Needles, 52 Mo. 17; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Griener v. Ulerey, 20 Iowa, 266; Massey v. Citizens' Building & Savings Ass'n of Paola, 22 Kan. 684.

⁸² Veeder v. Mudgett, 95 N. Y. 295; Eaton v. Aspinwall, 19 N. Y. 119; Wright v. Pipe Line Co., 101 Pa. 204, 47 Am. Rep. 701; Union Nat. Bank v. Hunt, 7 Mo. App. 42; Re Kings County Elevated R. Co., 105 N. Y. 97, 13 N. E. 18.

⁸³ Sentance v. Poole, 3 Car. & P. 1. In this case Lord Tenterden, C. J., delivered the following charge: "The question in this case is whether the defendant John Poole, at the time he put his name to this note, which is drawn in an unusual form, it being 'to your order,' and not addressed to any one, was or was not conscious of what he

the courts would protect such persons from the results of their own incapacity, whether designedly injured or even not injured at all. And while probably the majority of the decisions and very many of the text writers do in truth declare this to be the rule,⁸⁴ it is generally felt, whenever it is applied, that it is, as a working rule, impracticable. The consensus of opinion in regard to executed contracts, at least, is that the contract of a lunatic is voidable at his option, provided it can be shown that at the time of making the contract it was unfair, that the parties can be restored to their former condition, and that the lunatic was absolutely incapable of understanding what he was doing, and the other party knew of his condition.⁸⁵ But with executory contracts, and among them negotiable instruments, the law has not gone so far. There is still great weight of authority holding that a lunatic's contract is voidable, at his option, whether fair or unfair, or whether the other party is ignorant of or acquainted with his mental condition,⁸⁶ and it must be said that any other doctrine than this is not yet established. But more advanced views, based on

was doing, for, if he was, there must be a verdict for the plaintiff; but should you be satisfied that he was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, you ought to find for the defendant." *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Daniel, Neg. Inst.* 210; *Edw. Neg. Inst.* § 24; *Re Desiliver's Estate*, 5 Rawle (Pa.) 111, 28 Am. Dec. 645; *Van Deusen v. Sweet*, 51 N. Y. 378; *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73. See, also, *Brigham v. Fayerweather*, 144 Mass. 52, 10 N. E. 735; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Edwards v. Davenport* (C. C.) 20 Fed. 756.

⁸⁴ *Moore v. Hershey*, 90 Pa. 196; *Van Patton v. Beals*, 46 Iowa, 63.

⁸⁵ *Molton v. Camroux*, 4 Exch. 17; *Elliot v. Ince*, 7 De Gex, M. & G. 478; *Brown v. Jodrell*, 3 Car. & P. 30; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Shoulders v. Allen*, 51 Mich. 530, 16 N. W. 888; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

⁸⁶ *Sentance v. Poole*, 8 Car. & P. 1; *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *Van Patten v. Beals*, 46 Iowa, 63; *Daniel, Neg. Inst.* § 210; *Tied. Com. Paper*, 58.

business needs and the practical administration of law, are changing or perhaps developing this rule into rules which may be formulated as follows:

(1) After inquisition duly found, the courts will refuse to enforce the bill or note of an adjudged lunatic, or an indorsement by him against him directly, even in favor of a bona fide holder, but will direct his committee to pay the amount thereof, if it is a just claim. This rule applies to the bills, notes and indorsements of adjudged habitual drunkards.

(2) If no inquisition has been found, but the incompetency is known to the other party, then as between the parties the note is void.

(3) If no inquisition has been found, and if the incompetency is unknown to the other party, and the transaction is fair, and the parties cannot be replaced in *statu quo*, a recovery may be had upon the bill, note or indorsement against the incompetent.

An inquisition in lunacy is a judgment of the law which gives over the person and estate of the lunatic to the custody of court, and takes from him all competency to contract until his rights are restored by the court itself. By virtue of it, contracts of lunatics, made after inquisition found, create no binding legal tie, because it rests with the court in whose hands their property is to allow or disallow their enforcement.⁸⁷ The redress for claimants in obtaining payment of claims, is to present them to the officer of the court commissioned to conduct the affairs of the lunatic, who is usually called the "committee," of his person and estate. This committee upon their presentation investigates the transaction, and ascertains its justice. If the committee refuses payment, the claimant must then go into court, and ask permission to prosecute his claim by suit. If the court is satisfied of the justice of the debt, it

⁸⁷ *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 236; *Crippen v. Culver*, 13 Barb. (N. Y.) 424; *Clarke v. Dunham*, 4 Denio (N. Y.) 262; *Re McLaughlin, Clarke*, Ch. 113. It must be borne in mind that the contractual capacity of a lunatic under guardianship, as well as the procedure for enforcement of claims, depends upon statute, and differs in different states. *Bish. Cont.* § 977; *Clark, Cont.* 268.

will order it paid out of the funds in the hands of its committee; if doubtful, it will appoint a referee or master in chancery to ascertain its justice, or else direct it to be tested by a suit to be brought.³⁸ The law, to protect its own machinery, declares that an inquisition found is like a proceeding in rem, conclusive on all the world, and all are bound to take notice of it. Actual notice is not necessary, and, whether given or not, is immaterial. The inquisition is conclusive against subsequent acts and dealings, and presumptive against prior ones. And this is the rule irrespective of notice.³⁹ It must be noted that in England the inquisition is only presumptive evidence of lunacy,⁴⁰ and that in some states it is conclusive only as to parties, and others may rebut it by clear evidence.⁴¹ It is not meant to say, however, that the lunatic by inquisition is relieved from debts or liabilities incurred either before or after the inquisition. All that is meant is that he can no longer buy or sell or enter into any contract or dealing binding him or his estate. The court administers his estate for the protection of creditors, and will apply it to the payment of his debts and the satisfaction of all obligations and charges which legally ought to be satisfied out of his property.

This rule and the reasons for it apply to the bills, notes and indorsements of those adjudged to be habitual drunkards. If a person is adjudged incompetent to manage his own affairs by reason of drunkenness, such person is not liable upon his bill, note or indorsement even when the in-

³⁸ Williams v. Cameron's Estate, 26 Barb. (N. Y.) 172; Re Hopper, 5 Paige (N. Y.) 489, 491; L'Amoureaux v. Crosby, 2 Paige (N. Y.) 428, 22 Am. Dec. 655; Re Wing, 2 Hun (N. Y.) 671.

³⁹ Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386; Banker v. Bunker, 63 N. Y. 409; Van Deusen v. Sweet, 51 N. Y. 378; Rippy v. Gant, 4 Ired. Eq. (39 N. C.) 443; McGinnis v. Com. ex rel. McGinnis, 74 Pa. 245; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. '24.

⁴⁰ Sergeson v. Sealey, 2 Atk. 412; Faulder v. Silk, 8 Camp. 126.

⁴¹ Den ex dem. Aber v. Clark, 10 N. J. Law, 217, 18 Am. Dec. 417; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Moore v. Hershey, 90 Pa. 196; Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582; People v. Tax Com'r's, 100 N. Y. 215, 3 N. E. 85; Southern Masonic Relief Tier Ass'n v. Laudenbach (Sup.) 5 N. Y. Supp. 901.

strument is in the hands of a bona fide holder. The holder and purchaser is bound to take notice of the public judicial act of taking a man's property out of his hands, and putting it into that of a committee.⁴² The creditor must have his recourse against the committee, and not against the drunkard. And if the remedy is thus taken, and the court is satisfied upon the whole that the claim is just, it will allow it to be paid.⁴³

If no inquisition has been found, the validity of the bill, note or indorsement depends, first, upon the degree of understanding possessed by the party sought to be charged. A man of weak mind, if not a lunatic or a fool, can contract.⁴⁴ An epileptic or enfeebled mind has been held competent to convey property.⁴⁵ A person born deaf and dumb is not necessarily an idiot.⁴⁶ And no mere want of business capacity,⁴⁷ nor even monomania,⁴⁸ will, in the absence of fraud, prevent a party from being bound upon a bill, note, or indorsement. The mental incompetency, to avoid such a contract, must amount to inability to understand the nature of the contract, and to appreciate its probable consequences,⁴⁹ and this only, upon being established,

⁴² The contractual capacity of a habitual drunkard under guardianship depends upon the statute. See *Burgedorf v. Hamer* (Neb.) 145 N. W. 250.

⁴³ *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *L'Amoureaux v. Crosby*, 2 Paige (N. Y.) 427, 22 Am. Dec. 655.

⁴⁴ *Odell v. Buck*, 21 Wend. (N. Y.) 142.

⁴⁵ *Sprague v. Duel, Clarke*, Ch. (N. Y.) 90, affirmed 11 Paige (N. Y.) 480.

⁴⁶ *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441.

⁴⁷ *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Stewart's Ex'r v. Lispenard*, 26 Wend. (N. Y.) 255; *Lawrence v. Willis*, 75 N. C. 471; *Lewis v. Pead*, 1 Ves. Jr. 19.

⁴⁸ *Burgess v. Pollock*, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218; *West v. Russell*, 48 Mich. 74, 11 N. W. 812; *Boyce's Adm'r v. Smith*, 9 Grat. (Va.) 704, 60 Am. Dec. 313.

⁴⁹ *Titcomb v. Vantyle*, 84 Ill. 371; *Wall v. Hill's Heirs*, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578; *Hovey v. Chase*, 52 Me. 305, 83 Am. Dec. 514; *Davren v. White*, 42 N. J. Eq. 569, 7 Atl. 682; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Jackson ex dem. Cadwell v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 854.

will be allowed as a defense. But, once established, the question of the binding liability of this contract depends upon the fact whether the party dealing with him knew or did not know that he was dealing with a lunatic. In the absence of anything being shown upon the subject, the courts lean to the presumption that the party had this knowledge.⁵⁰ And if he possessed such knowledge, then the bill, note or indorsement as between the parties is void, and will not be enforced.⁵¹ But if he did not possess such knowledge, then the position of the parties has not as yet been fully developed and settled by the courts; but so far as it has, it depends, in the first place, upon whether the contract is fair. The courts have not defined what is meant by this, and its meaning naturally would be determined largely by the circumstances of each case. But in the absence of any expression on the subject, it is reasonable to suppose that a fair contract would mean such as business men of ordinary prudence would make, taking into consideration the circumstances of each case, and that the presence or absence of any intent to defraud, overreach or cheat would be an important element in determining the point. The next consideration in the relations of the parties, is whether upon repudiation of the contract by the lunatic the other party can be replaced in *statu quo*. This is because the right of cancellation, being an equitable one, must be governed by equity precedents, and among equity precedents one of the most important is that "he who seeks equity must do equity." The lunatic cannot keep the benefits of a contract, and at the same time rescind it. And these two considerations lead up to the rule, which is without doubt the most practical yet determined upon, that bills, notes or indorsements entered into by an insane person are valid where the other party acted in good faith,

⁵⁰ *Riggs v. American Tract Soc.*, 84 N. Y. 830, reargued 95 N. Y. 503.

⁵¹ *Westerfield v. Jackson*, 8 N. Y. St. Rep. 354; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Johnson v. Stone*, 35 Hun (N. Y.) 380; *Hannahs v. Sheldon*, 20 Mich. 278; *McClain v. Davis*, 77 Ind. 419; *Lincoln v. Buckmaster*, 82 Vt. 652; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642.

without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry.⁵² Whether the other party has the full rights of a bona fide holder or not, and whether all presumptions are in his favor or not, is not clear. Declarations of courts within recent years imply that the presumptions are not in his favor, and that, lunacy being shown, the burden is upon the holder to show ignorance, fairness and irreparable loss.⁵³ But it is to be suspected that the courts in making these decisions were influenced more by the ancient doctrines than the modern tendencies of law. These modern tendencies, followed to their logical conclusion, would seem to require that it be shown affirmatively against the holder that in his dealing with the negotiable instrument he had violated some of the equities we have mentioned; and that the defendant should be called upon, not only to show the lunacy, but also the plaintiff's knowledge or suspicion of it, as well as the unfairness of the transaction. Such, however, at present, does not seem to be the rule.

The courts have arrived at rules regulating contracts of intoxicated persons by very similar steps. These rules depend upon the question whether the drunkard was adjudged incompetent to manage his affairs or not, and, if not, then the question arose in what stage of drunkenness the contract was made. They have classified the rules in cases where no committee has been appointed as follows:

(1) When a maker, acceptor or indorser is so intoxicated that he is entirely bereft of his senses, the weight of authority is that no recovery against him can be had by the bona fide holder; and, if no recovery can be had, then he may recover upon the original consideration.

⁵² Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541; Browne v. Joddrell, 1 Moody & M. 105; Re Beckwith, 3 Hun (N. Y.) 443; Hirsch v. Trainer (N. Y.) 3 Abb. N. C. 274, and note; Dane v. Kirkwall, 8 Car. & P. 679; Molton v. Camroux, 2 Exch. 487, affirmed 4 Exch. 17; Elliott v. Ince, 7 De Gex, M. & G. 475; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Beals v. See, 10 Pa. 56, 49 Am. Dec. 573; Behrens v. McKenzie, 23 Iowa, 343, 92 Am. Dec. 428.

⁵³ Hicks v. Marshall, 8 Hun (N. Y.) 327; Goodell v. Harrington, 3 Thomp. & C. (N. Y.) 345.

(2) That when a maker, acceptor or indorser is slightly under the influence of liquor, a recovery can be had. Such a state can be used only to show fraud.

In cases of bills and notes made in a state of complete intoxication by persons not adjudged habitual drunkards, there is a difference of opinion in different jurisdictions. The majority of decisions of the courts and also the majority of the text writers declare that total drunkenness is a perfect defense to a drunkard's bill or note or the indorsement thereon. And these authorities imply that it is such even when prosecuted by a purchaser for value without notice, because, as they say, it is voidable.⁵⁴ But there are other opinions of courts which consider such a bill or note perfectly good in his hands.⁵⁵ The English courts are governed in their rulings by the somewhat artificial differences growing out of their former system of pleading. In those courts it is held, with regard to contracts which it is sought to avoid on the ground of intoxication, that there is a distinction between "express" and "implied" contracts. When a right of action is grounded upon an express contract, requiring the assent of both parties, and one of them is incapable of assenting, there can be no binding contract. But in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances, and itself makes the contract for the parties. A tradesman, for example, who supplies a drunken man with necessaries may recover the price of them, if the party keeps them when he becomes sober.⁵⁶ An so with negotiable instruments, the defendant is still liable for the consideration of the instrument or of the indorsement, though he is not upon the instrument itself. Upon the other side

⁵⁴ Gore v. Gibson, 13 Mees. & W. 623; Wigglesworth v. Steers, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602; Jenners v. Howard, 6 Blackf. (Ind.) 240; Hawkins v. Bone, 4 Fost. & F. 311; Byles, Bills, 64: Tied. Com. Paper, § 57; Daniel, Neg. Inst. § 214; Green v. Gunstan (Wis.) 142 N. W. 261, 46 L. R. A. (N. S.) 212 (N. I. L.). But see Wilson v. Nisbet, 2 Mor. Dict. 1509.

⁵⁵ Johnson v. Medlicott, 3 P. Wms. 130, note; State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246; McSparran v. Neeley, 91 Pa. 17.

⁵⁶ Pollock, C. B., in Gore v. Gibson, 13 Mees. & W. 623.

of the question, it is urged in behalf of the bona fide holder that the equities are in favor of the bona fide holder. Drunkenness ought not to be regarded, because it is the man's own fault.⁵⁷ It is not to be placed on the footing of insanity, because it is temporary. The law protects, and ought to protect, the helpless infant and the God-stricken insane, but should not the vicious or foolish drunkard. And of two aggrieved parties—the drunkard and the bona fide holder—it would seem clearly that the equities of the latter should prevail.⁵⁸ When the intoxicated person is not bereft of his senses, there can be no doubt about the position. If the party were only in that state of pleasant exhilaration common in such cases, and was clear in his mind upon what he was doing, then intoxication is no defense. It may only be used as a means of showing fraud, for intoxication may have been used as a means of imposing upon the party to the instrument. But here the fraud, and not the intoxication, is the basis of defense.⁵⁹ The party had capacity to incur an obligation, and the courts will enforce the obligation he has incurred. That his senses were clouded would be no excuse. The court could no more take that into consideration than it could that one party was sharper than another in making a bargain.⁶⁰

⁵⁷ Wilson v. Nisbet, 2 Mor. Dict. 1509.

⁵⁸ Berkley v. Cannon, 4 Rich. (S. C.) 138; Northam v. Latouche, 4 Car. & P. 145. And see Smith v. Williamson, Johns. Cas. Bills & N. 193. The conclusion stated in the text does not seem sound. The unknowing signing of notes is not a probable consequence of intoxication. Therefore there should be no estoppel by negligence. Green v. Gunstan (Wis.) 142 N. W. 261, 46 L. R. A. (N. S.) 212 (N. I. L.). Compare Gittings v. Duncan (Iowa) 145 N. W. 872 (N. I. L.).

⁵⁹ Say v. Barwick, 1 Ves. & B. 195; Willcox v. Jackson, 51 Iowa, 208, 1 N. W. 513. Compare with this section, §§ 109, 110, infra.

⁶⁰ MILLER v. FINLEY, 26 Mich. 249, 12 Am. Rep. 308, Moore Cases Bills and Notes, 189; Caulkins v. Fry, 35 Conn. 170; Reinicker v. Smith, 2 Har. & J. (Md.) 421; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101.

100. STATUTES—Statutes which avoid instruments are of the following varieties:

- (a) Those which in words declare the contract void.
- (b) Those which annex a penalty to the consideration or performance of the act for which the bill, note, or indorsement is given.

This section is properly but a part of the later one of this chapter upon "Illegality of Consideration." And both of these sections are but extracts of the positions taken upon the subject of the legality of the object of contracts in the elementary works upon that subject. The scope of this work does not admit of a thorough discussion of the statutes which render the consideration of bills, notes and indorsements illegal. To pursue that subject with any thoroughness, the student must examine works on the general subject of contracts. It is our purpose only to state the leading principles concerning the application of statutes avoiding contracts to bills and notes, and then to discuss somewhat more at length the statutory doctrine of usury, which of all the statutes avoiding negotiable instruments is most often before the courts.

Statutes may avoid a bill or note in two ways. The first is where in words it declares them to be void.⁶¹ Such a

⁶¹ An instance of this is found in the case of Bowyer v. Bampton, 2 Strange, 1155, where it was held that the innocent indorsee of a gaming note can maintain no action against the drawer. He may, however, sue the indorser upon his indorsement. This case was decided in accordance with St. 9 Anne, c. 14, § 1, which says "that all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall be void to all intents and purposes whatever." For other cases in which bills or notes are void by virtue of a statute, see Easter v. Minard, 26 Ill. 494; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118; Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57; Wiggin v. Bush, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; First Nat. Bank of Kansas City v. Grindstaff, 45 Ind. 158; Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105. Under statute declaring contracts on gambling consideration void, notes given on sale of dice-throwing machines held void in hands of innocent purchaser. Kuhl v. M. Gally Universal Press Co., 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135.

declaration means that it was the object of the Legislature entirely to prevent the circulation of a bill or note as commercial paper.⁶³ And this object the courts will enforce despite any equities that a bona fide purchaser may have. The reason for this is that the public good, evidenced by this intention to prevent circulation, overrides any private right.⁶⁴ The student must note carefully that this reasoning does not apply when the statute merely declares the consideration of a bill or note to be illegal. An illegal consideration is one which may be in itself valid. Yet courts will not enforce it, because the Legislature has declared in its statute that the people deem it against the public welfare to allow it to be enforced. Therefore, in view of the legislative act, it is an invalid consideration, or, in other words, no consideration at all. Hence, against a bill or note in the hands of a bona fide holder, mere illegality of consideration can no more be urged than lack of consideration can.⁶⁴ For, in declaring a consideration illegal mere-

⁶³ See cases cited in note 87, p. 314, *infra*.

⁶⁴ *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *City of Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *Cazet v. Field*, 9 Gray (Mass.) 329; *Towne v. Rice*, 122 Mass. 67; *Glenn v. Farmers' Bank of North Carolina*, 70 N. C. 191; *Bowyer v. Bampton*, 2 Strange, 1155.

⁶⁴ *Rockwell v. Charles*, 2 Hill (N. Y.) 499; *Hill v. Northrup*, 4 Thomp. & C. (N. Y.) 120; *Grimes v. Hillenbrand*, 4 Hun (N. Y.) 354; *State Bank of Chicago v. Holland*, 103 Tex. 266, 126 S. W. 564; *Wilson v. National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269; *State Bank of Greentown v. Lawrence*, 177 Ind. 515, 96 N. E. 947, 42 L. R. A. (N. S.) 328; *Bluthenthal & Bickart v. City of Columbia*, 175 Ala. 398, 57 South. 814. Section 55, N. I. L., provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Section 57, N. I. L., provides: "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties between themselves, and may enforce payment of the instrument for the full amount thereof against all the parties liable thereon." It is clear that the fact that the instrument was made, drawn, or indorsed in pursuance of an illegal transaction gives a defense as against any party to the instrument who was party to that transaction, which defense constitutes a defect in the

ly, the Legislature will not be presumed to intend to prevent the circulation of the bill or note, but merely to forbid its enforcement between immediate parties.⁶⁵

title of such party within the meaning of these sections. Keene v. Behan, 40 Wash. 505, 82 Pac. 884 (N. I. L.), usury; Royal Bank of New York v. Reinschreiber (Sup.) 126 N. Y. Supp. 749 (N. I. L.). So where the law in force at the time of the adoption of the N. I. L., or a subsequent enactment, does not declare such an instrument to be void, it is clear that, under the N. I. L., a holder in due course can recover on the instrument. American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390 (N. I. L.), usury; Gray v. Boyle, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042 (N. I. L.), note given for insurance premium in pursuance of agreement to give illegal rebate; Arnd v. Sjoblom, 131 Wis. 642, 111 N. W. 866, 10 L. R. A. (N. S.) 842, 11 Ann. Cas. 1179 (N. I. L.), note given for lightning rods without a statement on face of its consideration; Samson v. Ward, 147 Wis. 48, 132 N. W. 629 (N. I. L.), note given for stallion without a statement, on its face, of its consideration. It has been held that these sections (N. I. L. §§ 55, 57), interpreted in connection with the other sections of the act, impliedly repeal any prior statute by which a drawing, making, or indorsing of an instrument in violation thereof is declared void, and so in spite of such prior statute permits a recovery on such instrument by a purchaser for value without notice of such illegality. Wirt v. Stubblefield, 117 App. D. C. 283 (N. I. L.). In that case it was held that the statute, which was in force prior to the adoption of the N. I. L., providing that a note or bill given for a gambling debt was void for any purpose and in any hands, was repealed by section 190, N. I. L. (as adopted in the District of Columbia), providing that "all laws of force within the District of Columbia inconsistent with the foregoing provisions of this act be and the same hereby are repealed," on the ground that section 55, construed in the light of the general purpose of the act, which was to uniformly declare the rule most favorable to bona fide purchasers for value, made any illegality in the consideration for which the note was given only a defect in the title of a holder who was a party to the illegal transaction, and thus was inconsistent with the prior statute in question. And in New York it has been held by one decision of the Supreme Court that the statute declaring void contracts made for usurious considerations (1 Rev. St. 772, § 5, as amended by Laws 1837, c. 430, § 1; 2 Birdseye, Rev. St. [3d Ed.] p. 1929) is impliedly amended by the N. I. L., so as to permit a recovery on a usurious instrument by a holder in due course. This conclusion was reached in spite of the facts that the repealing section of the N. I. L. as adopted in New York (2 Birdseye, Rev. St. [3d Ed.] p. 2494, § 340) designated the particular laws which were

⁶⁵ Vallett v. Parker, 6 Wend. (N. Y.) 615.

The second general class of statutes which avoid bills and notes are those which inflict penalties. It is thought by the courts that the intention of the Legislature in affixing penalties is to suppress a mode of dealing which it regards as injurious to society by attainting the contract, and

repealed by the act, that such section did not refer to the above statute making usurious contracts void, and that there was no section in the N. I. L. as adopted in New York expressly amending any statute not repealed by the act. *Klar v. Kostuk*, 65 Misc. Rep. 199, 119 N. Y. Supp. 683 (N. I. L.), Lehman, J., dissented. The opinion of the majority of the court followed the opinion of Laughlin, J., concurring in *Schlesinger v. Kelly*, 114 App. Div. 546, 99 N. Y. Supp. 1083 (N. I. L.), and the conclusion of Bartlett, J., concurring in *Schlesinger v. Gilhooley*, 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138 (N. I. L.). Accord: *Broadway Trust Co. v. Manheim*, 47 Misc. Rep. 415, 95 N. Y. Supp. 93 (N. I. L.), semble, *Wood v. Babbitt* (C. C.) 149 Fed. 818, 822 (N. I. L.), semble. The dissenting justice followed the opinion of Cullen, C. J., in *Schlesinger v. Gilhooley*, 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138 (N. I. L.), which was concurred in by two other justices. In the case last cited, Cullen, C. J., said: "I think that under well-settled principles of statutory construction we cannot construe its general language as repealing the provisions of the usury, gaming, and lottery laws, which render obligations given on such considerations absolutely void. The Negotiable Instruments Law applies only to commercial paper, and the effect of the usury and gaming statutes, like that relating to patent rights, is to withdraw notes given on such considerations from the domain of negotiable instruments. *Eastman v. Shaw*, 65 N. Y. 522." Accord: *Crusins v. Siegman*, 81 Misc. Rep. 367, 142 N. Y. Supp. 348 (N. I. L.). See *Sabine v. Paine*, 148 App. Div. 730, 132 N. Y. Supp. 813 (N. I. L. not cited), semble. It is to be noted that this view has received the approval of more justices of Court of Appeals of New York than any other. In the N. I. L. as enacted in Kentucky, the repealing section (Carroll, Ky. St. 1909, § 3720 b—195) provides: "All laws inconsistent with this act are hereby repealed." In *ALEXANDER & CO. v. HAZELRIGG*, 123 Ky. 677, 97 S. W. 353 (N. I. L.), Moore Cases Bills and Notes, 163, it was held that the N. I. L. did not modify the statute which up to the time when the N. I. L. was enacted made a note given for a gambling debt absolutely void. The court expressly disapproved *Wirt v. Stubblefield*, 17 App. D. C. 283 (N. I. L.). Accord: *Lawson v. First Nat. Bank* (Ky.) 102 S. W. 324 (N. I. L.); *McAfee v. Mercer Nat. Bank* (Ky.) 104 S. W. 287 (N. I. L.); *Citizens' Bank v. Crittenden Record-Press*, 150 Ky. 634, 150 S. W. 814 (N. I. L.). A statute making a contract of indorsement void as a gaming contract does not prevent the indorsement from causing a transfer of title. *Kushner v. Abbott* (Iowa) 137 N. W. 913 (N. I. L.).

attaching penal consequences to it whenever set up as a proof of debt.⁶⁶ Such at least is the early doctrine, and it would seem to be the view of the courts at present that a penalized consideration renders the bill or note void, and not merely illegal.⁶⁷

101. **USURY**—In many states usury is by statute made a real defense. Usury is taking or receiving, with corrupt intent, money, goods, or things in action at a rate of interest upon the loan or forbearance of money, in a greater amount than is allowed by statute.
102. In many states the holder of a bill or note, even if he be a purchaser for value without notice, cannot recover the amount of the instrument from persons who were parties to the instrument at its inception, when the instrument was negotiated in its inception at a rate greater than the legal rate of interest.
103. Where an indorsee acquires a bill or note by way of discount at a rate greater than the legal rate of interest, such transfer is a sale by the indorser and a purchase by the indorsee, for which the indorsee may recover the full amount of the maker, acceptor, or other prior parties, but (in some jurisdictions) only the amount paid for the bill of his prior indorser.

Usury is of that class of evils called in law "malum prohibitum." By this is meant something that is in itself not

⁶⁶ Shaw, C. J., in *Kendall v. Robertson*, 12 Cush. (Mass.) 156; *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671.

⁶⁷ This is not a correct statement of the law at present. Where the statute inflicts a penalty for the making, drawing, or indorsing under certain circumstances, the making, drawing or indorsing is not void, but merely illegal. The result is that an innocent purchaser for value without notice of such illegality can recover on the instrument against the maker, drawer, or indorser. Cases cited in note 64, p. 304, *supra*.

intrinsically wrong, but something which the people, through their legislatures, have declared inexpedient as a business practice, and therefore not to be allowed. It is a wrong which is created by statute, and in derogation of common law. And the first thing to be noticed is, that the statutes which create it are strictly construed and their operation is confined in every possible way. To constitute usury three elements are necessary: (1) More than the lawful rate of interest must have been received or reserved. (2) It must be the effect of a corrupt agreement. (3) The subject of the contract must be a loan. And in discussing the subject in the brief space permitted here, it is purposed in the first place to outline very generally the nature of usury, and then to consider the commonest instances in which it arises in cases of bills and notes.

Intent

Usury is the effect of a corrupt agreement. There must exist the intention knowingly to commit usury.⁶⁸ This intent of the parties, when the contract is not upon its face usurious, is to be gathered from such circumstances as the situation and object of the parties at the time of the loan, the character and use to be made of the funds or article transferred, and the time and manner and place of payment. Designedly taking and receiving interest greater than the legal rate, although there be no corrupt agreement other than that which is manifested by one party allowing and the other receiving interest, is sufficient evidence of intent. In fact, this is generally the way in which the corrupt agreement is shown.

Loan or Forbearance of Money

It is a well-settled rule that the loan must be of money,⁶⁹ unless otherwise expressly provided by statute. An agree-

⁶⁸ Price v. Campbell, 2 Call (Va.) 110, 1 Am. Dec. 535; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Nourse v. Prime, 7 Johns. Ch. (N. Y.) 77, 11 Am. Dec. 403; Bank of United States v. Waggener, 9 Pet. 399, 9 L. Ed. 163; Tyson v. Rickard, 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; Bearce v. Barstow, 9 Mass. 45, 6 Am. Dec. 25; Scott v. Lloyd, 9 Pet. 418, 9 L. Ed. 178; Duncan v. Maryland Sav. Inst., 10 Gill & J. (Md.) 299.

⁶⁹ Dry Dock Bank v. American Life Ins. & Trust Co., 3 N. Y. 344;

ment, for example, whereby the parties loaned cattle, upon the understanding that during the loan the lessee was to pay a stipulated sum for the use of the property, with the further stipulation that the lease might terminate in sale, but, if the sale was not carried out, the cattle were to be returned, was held not a usurious one. The case turned upon the principle that, where the agreement was for the loan of chattels, it was immaterial whether the compensation fixed by the agreement exceeded the statutory rate, because the subject of the loan, since it was not money, was not within the statute of usury. An agreement where sheep were loaned, and, by the contract, the same number were to be returned, of the same age and quality, with interest of 15 to 25 per cent. upon their cash value,⁷⁰ and another agreement where a heifer was loaned at an interest of 25 per cent., to be returned in kind,⁷¹ were considered not usurious. These differ from money, in that money is supposed to have a fixed value. Chattels vary according as the market rises or falls. Therefore a loan of animals to be returned in animals is not usury, usury being confined to money only. The courts construe this out of the term usually employed in the statutes, "the rate of interest." They take the ground that interest and forbearance cannot be predicated of any other than a loan of money, actual or presumed, because money has the same value when the loan is made and when returned; whereas chattels, measured by the standard of money, so fluctuate that taking the chattels borrowed and returned with the compensation for the use of the same at the time of returning the borrowed property may or may not aggregate in money value the value of the property loaned in the first instance. In the case of negotiable instruments, where an accommodation party makes, accepts, or indorses an instrument, and re-

Bull v. Rice, 5 N. Y. 315; Perrine v. Hotchkiss, 2 Lans. (N. Y.) 418; Dunham v. Dey, 13 Johns. (N. Y.) 40; Suydam v. Westfall, 4 Hill (N. Y.) 211; Ketchum v. Barber, 4 Hill (N. Y.) 225; Tardeveau v. Smith's Ex'rs, Hardin (Ky.) 185, 3 Am. Dec. 727; Foote v. Emerson, 10 Vt. 338, 33 Am. Dec. 205; Spencer v. Tilden, 5 Cow. (N. Y.) 144.

⁷⁰ Hall v. Haggart, 17 Wend. (N. Y.) 280.

⁷¹ Cummings v. Williams, 4 Wend. (N. Y.) 680.

ceives a commission for so doing, deducted from the avails of the note itself, there is no usury.⁷³ The statute forbids an illegal rate of interest upon the loan or forbearance of money. This is a loan of credit, and not of money, credit being a distinct property from money. So lenders may, in addition to lawful interest on the discount of bills and notes, take a reasonable commission by way of compensation for trouble and expense, provided such commission be not intended as a device to cover a usurious loan.⁷⁴ In all of these things, the moneys paid or deducted were for some other reason than the mere loan of money itself. Something was done in addition to handing over the money, and that something was paid for. Such payment was not interest, but rent or compensation.⁷⁴

Interest in Advance—Compound Interest

Another thing to mention is the common practice by which interest is taken in advance upon the face value of the paper. The lender here has the use of his own discount, and this, in case of discount of paper in large amounts, aggregates sometimes very large sums of money. This is, in fact, usurious, but, time out of mind, it has been

⁷³ *Van Duzer v. Howe*, 21 N. Y. 531; *Kitchel v. Schenck*, 29 N. Y. 515.

⁷⁴ *Thurston v. Cornell*, 38 N. Y. 281; *Morton v. Thurber*, 85 N. Y. 551; *Eaton v. Alger*, 2 Abb. Dec. (N. Y.) 5; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Dayton v. Moore*, 30 N. J. Eq. 543; *Atlanta Mining & Rolling Mill Co. v. Gwyer*, 48 Ga. 11; *Cockle v. Flack*, 93 U. S. 344, 33 L. Ed. 949; *De Forest v. Strong*, 8 Conn. 513. In *Kent v. Walton*, 7 Wend. (N. Y.) 256, it was held by Savage, C. J., that "to make out the defense of usury, it was necessary to show that the note was not a valid instrument when discounted. * * * It is well settled that discounting a business note at more than seven per cent. interest is not usury." "The principle is too well settled to be questioned that a bill free from usury in its concoction may be sold at a discount; because, as it was free from usury between the original parties to it, no subsequent transaction can, as it respects those parties, invalidate it." *Sutherland*, J., in *Cram v. Hendricks*, 7 Wend. (N. Y.) 569, 572. And see *Wiffen v. Roberts*, 1 Esp. 261. But see *Cloflin v. Boorum*, Johns. Cas. Bills & N. 168.

⁷⁴ *Ketchum v. Barber*, 4 Hill (N. Y.) 225.

the custom, and is allowed for the benefit of trade.⁷⁵ It is confined in its operation to negotiable instruments, because of their importance in commercial affairs, and because it is the established custom of banks, which play so important a part in discounting them that on all hands it is deemed necessary for the circulation of the instrument in the course of trade. Again, compound interest is not usury.⁷⁶ There is this distinction, however: An agreement for compounding future interest is illegal, not because such agreements are obnoxious to the usury laws, but because they may serve as a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive and ruinous.⁷⁷ But where the interest has already accrued, then the parties may lawfully agree to turn such interest into principal, and to carry the interest, and the forbearance will constitute a consideration. As a matter of fact, there is no new loan, and the interest is in excess of the legal rate. But the law implies a loan, and, an agreement being made, it declares the contract free from the taint of usury.

Effect of Usury

But, usury being once present, the next question is, how far does the statute operate in avoidance of contracts where it in words declares the contract void or penalizes the transaction. The general rule in such cases is that, as between immediate parties in respect to all persons seeking enforcement of the contract, it is void. Usury being a purely statutory defense, the statutes must be examined in each instance to know just the extent of its effect. The taint of usury in the original contract is carried forward and enters into all subsequent contracts taken in renewal of it. And

⁷⁵ *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 552, Fed. Cas. No. 850; *Warren Deposit Bank v. Robinson's Adm'r* (Ky.) 35 S. W. 275.

⁷⁶ *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352; *Guernsey v. Rexford*, 63 N. Y. 631; *Culver v. Bigelow*, Johns. Cas. Bills & N. 171; *Miner v. Paris Exch. Bank*, 53 Tex. 559; *Hamilton v. Le Grange*, 2 H. Bl. 144; *Fobes v. Cantfield*, 3 Ohio, 17.

⁷⁷ *Quackenbush v. Leonard*, 9 Paige (N. Y.) 334; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

if it appears that a contract in the first instance is void, and is sought to be renewed by changing its form, so that the contract still stands upon the original loan, then the loan given in renewal is also void.⁷⁸ This general rule is also very much confined, the exceptions being probably more numerous than the application of the rule itself. A mortgage, for instance, may be void for usury, but a bona fide purchaser of the property under its foreclosure acquires good title.⁷⁹ A party is estopped from setting up usury where, by his representations, he has persuaded an innocent party to discount a negotiable instrument. Contracts voidable for usury may be ratified and become valid contracts.⁸⁰ And also, where a renewal note is void for usury, the parties may sue upon the original consideration.⁸¹ And, lastly, usury is a defense which can only be availed of by parties to the contract, or those connected in interest with them. A mere stranger, or one who has no legal interest in the question, may not take advantage of the statute, because the intent of the statute was to relieve oppressed debtors. They alone may claim its protection, and declare the contract, usurious in its inception, void.⁸²

Same—As Applied to Bills and Notes

It only remains to apply the theories of usury where they avoid the instrument, to the doctrines of bills and notes. The more common situations to which the rules of usury have been applied are these: (1) Where an instrument is usurious in its inception;⁸³ (2) where a contract is valid

⁷⁸ Campbell v. Sloan, 62 Pa. 481; Pickett v. Merchants' Nat. Bank of Memphis, 32 Ark. 346.

⁷⁹ Jackson v. Henry, 10 Johns. (N. Y.) 195, 6 Am. Dec. 328; Elliott v. Wood, 53 Barb. (N. Y.) 285.

⁸⁰ Dix v. Van Wyck, 2 Hill (N. Y.) 522, and cases cited.

⁸¹ Farmers' & Mechanics' Bank v. Joslyn, 37 N. Y. 353; Winsted Bank v. Webb, 39 N. Y. 325, 476, 100 Am. Dec. 435, and note; Knights v. Putnam, 3 Pick. (Mass.) 184; Oates v. First Nat. Bank, 100 U. S. 239, 25 L. Ed. 580. See, also, Ohio & M. R. Co. v. Kasson, 37 N. Y. 218; De Wolf v. Johnson, 10 Wheat. 367, 6 L. Ed. 343; Ward v. Sugg, 13 N. C. 489, 8 S. E. 717, 24 L. R. A. 280, Johns. Cas. Bills & N. 163.

⁸² Mason v. Lord, 40 N. Y. 490.

⁸³ As to conflict of laws, see ante, p. 247.

in its inception, but usury is alleged in a subsequent indorsement or transfer of it; (3) where one indorser seeks to avail himself of it as a defense where either the note had a usurious inception, or prior indorsements have been corrupted by usury.

Where a bill or note is delivered to the payee for consideration, the question of usury in the inception of the instrument depends of course upon the nature of the transaction between the original parties. But in the case of accommodation paper a different question is presented. If the accommodated payee negotiates the instrument to one who pays less than the amount due upon it after deducting lawful interest, it has been held by numerous cases⁸⁴ that the instrument has its inception when delivered to such person, and the transaction is deemed to be a loan, and usurious, although he was ignorant of the character of the paper. The test is held to be whether the person so discounting the instrument takes it from one who could have maintained an action upon it against the prior parties. It is difficult, however, if not impossible, to reconcile these cases with the rule that, aside from usury, accommodation paper has its inception, as against a bona fide purchaser, when delivered to the payee, and that as against such a holder lack of consideration between the original parties is no defense. The correct rule appears to be that as against one who purchases, even for a sum which in case of a loan would be usurious, without knowledge that the paper is accommodation paper, it must be deemed to have had its inception

⁸⁴ *Sweet v. Chapman*, 7 Hun (N. Y.) 576. It was held by Noxon, J., in this case that "the rule appears to be settled that a promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced against the original parties, and, if not valid in the hands of the payee, cannot be rendered valid by a sale to a bona fide purchaser at a rate of interest exceeding seven per cent." *Hall v. Wilson*, 16 Barb. (N. Y.) 548; *Hall v. Earnest*, 36 Barb. (N. Y.) 588; *Rapelye v. Anderson*, 4 Hill (N. Y.) 483; *Bossange v. Ross*, 29 Barb. (N. Y.) 576; *Belden v. Lamb*, 17 Conn. 452; *Holeman v. Hobson*, 8 Humph. (Tenn.) 129; *Corcoran v. Powers*, 6 Ohio St. 19; *Bock v. Lauman*, 24 Pa. 448; *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565.

when delivered to the payee.⁸⁵ The latter rule is supported by Mr. Daniel, who maintains that "in all cases, if the holder at the time he received the note did not know the fact that it was not a valid and subsisting security, there is no intention of borrowing and lending, which is necessary to create usury; and the holder may recover upon it against the maker."⁸⁶

When the paper is usurious in its inception, then it is void as to the maker, acceptor, and parties prior to the discount, and no subsequent transaction can make it valid.⁸⁷ Void in its inception, it continues void forever, whatever its subsequent history may be. It is as void as to these parties in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade.⁸⁸

⁸⁵ Holmes v. State Bank of Duluth, 53 Minn. 350, 55 N. W. 555; Jackson v. Travis, 42 Minn. 438, 44 N. W. 316; Veazie Bank v. Paulk, 40 Me. 109; May v. Campbell, 7 Humph. (Tenn.) 450; Whitworth v. Adams, 5 Rand. (Va.) 333; Daniel, Neg. Inst. § 751; 2 Ames Cas. Bills & N. 882.

⁸⁶ Daniel, Neg. Inst. § 752.

⁸⁷ This is true only where the statutes expressly declare the instrument to be void. American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390 (N. I. L.), and other cases cited in note 64, p. 304, *supra*. And even where the statute expressly declares the instrument to be void, it has been said that a party to such an instrument may, by representation, estop himself from denying its validity. Sage v. McLaughlin, 34 Wis. 550, *semble*. See, also, Lawson v. First Nat. Bank (Ky.) 102 S. W. 324. But see Kyser v. Miller, 144 Ill. App. 316.

⁸⁸ Clafin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Powell v. Waters, 8 Cow. (N. Y.) 669; Wilkie v. Roosevelt, 3 Johns. Cas. (N. Y.) 206, 2 Am. Dec. 149; Bennet v. Smith, 15 Johns. (N. Y.) 385-357; Miller v. Hull, 4 Denio (N. Y.) 104, 107; Miller v. Zeimer, 111 N. Y. 441-444, 18 N. E. 716; Lowe v. Waller, 2 Doug. 736; Atlanta Sav. Bank v. Spencer, 107 Ga. 629, 33 S. E. 878; Lowes v. Mazzaredo, 1 Starkie, 385. In this case it was held that, where the payee of a bill of exchange indorses it upon a usurious contract at the time of the contract, a bona fide holder cannot afterwards recover upon it against the acceptor. Chapman v. Black, 2 Barn. & Ald. 590. As to the effect of the N. I. L., see p. 304, note 64, *supra*.

Where the instrument is not usurious in its inception, the question arises whether a transfer for an amount less than the face of the instrument, after deducting legal interest, is in turn usurious. It is no doubt true that, if a bill or note be indorsed as collateral security for a usurious loan, the indorsement is affected by the usury.⁸⁹ In such case the indorsement is void, and no action can be maintained thereon, even by a bona fide purchaser for value, against the indorser; nor, it seems, can an action be maintained thereunder against prior parties,⁹⁰ though there is authority for the position that such a holder can trace title under the indorsement, and thereby maintain an action against prior parties who were not parties to the usury.⁹¹ It has even been held by some courts that whenever the instrument is transferred for less than face value deducting legal interest

⁸⁹ Levy v. Gadsby, 3 Cranch, 180, 2 L. Ed. 404. Whether a loan or a sale, held to be a question of fact. Becker's Investment Agency v. Rea, 63 Minn. 459, 65 N. W. 928.

⁹⁰ Lowes v. Mazzaredo, 1 Starkie, 385; Nichols v. Pearson, 7 Pet. 103, 8 L. Ed. 623. The question of statutory construction here presented is whether the statute prevents the illegal acts from transferring title to or assigning the instrument, or merely prevents such acts from constituting a contract of indorsement. This question should be distinguished from the following: Where the indorsement is in the course of an illegal transaction, but is not declared void, is the illegality of this indorsement a defense to a prior party to the instrument in an action upon it against him? In the latter situation it cannot be denied that the indorsement passed title. Nevertheless in Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 96 Am. St. Rep. 693 (N. I. L.), it was held that a payee of a cashier's check, who indorsed it in the course of an illegal transaction, could recover the face value from the bank, which paid the instrument to the indorsee of the payee after the payee had notified the bank not to pay it. The court said that this conclusion was unavoidable under N. I. L., referring to section 55 as declaring the title of the indorsee in this case to be defective, and that the situation was the same as if the indorsee had been a thief, who had stolen an instrument indorsed in blank by the plaintiff. The court did not refer to sections 51 and 81, N. I. L. See, further, *infra*, §§ 125-127a.

⁹¹ Knights v. Putnam, 3 Pick. (Mass.) 185; Armstrong v. Gibson, 31 Wis. 66, 11 Am. Rep. 599. Mr. Daniel supports this view. Daniel, Neg. Inst. § 760.

the transfer is usurious;⁹² but this view cannot be maintained upon principle, since it confounds a transaction which is really a sale with a loan. It is generally held, therefore, that the mere discount of the instrument for more than legal interest is not usurious, and that the transferee may recover against all parties.⁹³ Yet, conceding the right of the indorsee to recover, another question upon which the authorities are in conflict has arisen—whether he may recover the face of the instrument, or merely the amount which he paid for the indorsement. It is generally admitted that from prior parties he may recover the full amount of the bill or note, but many cases limit the amount of his recovery against his indorser to the amount paid.⁹⁴ No good reason for such a distinction is apparent, and other cases hold, upon what it seems is the correct principle, that the indorsee may recover the face value as well from his indorser as from prior parties.⁹⁵ This right of the indorsee is not to be confounded with the right of the indorsee, as well as of the transferee by delivery, to recover for breach of the implied warranty of validity of the instrument, for the recovery for breach of this warranty is limited, as we have seen, to the amount of the consideration paid.⁹⁶

In conclusion it must be repeated that usury is purely a

⁹² *Lowes v. Mazzaredo*, 1 Starkie, 385; *Chapman v. Black*, 2 Barn. & Ald. 588; *Whitworth v. Adams*, 5 Rand. (Va.) 419.

⁹³ *Parr v. Ellason*, 1 East, 92; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Crane v. Price*, 35 N. Y. 494; *Corning v. Pond*, 29 Hun (N. Y.) 129; *Nichols v. Fearson*, 7 Pet. 109, 8 L. Ed. 623; *Newman v. Williams*, 29 Miss. 222; *French v. Grindle*, 15 Me. 163; *Ayer v. Tilden*, 15 Gray (Mass.) 178, 77 Am. Dec. 356.

⁹⁴ *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Ingalls v. Lee*, 9 Barb. (N. Y.) 651; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Noble v. Walker*, 32 Ala. 458; *Coye v. Palmer*, 18 Cal. 158; *French v. Grindle*, 15 Me. 163.

⁹⁵ *Roark v. Turner*, 29 Ga. 455; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 623; *Belden v. Lamb*, 17 Conn. 441; *Turner v. Brown*, 3 Smedes & M. (Miss.) 425. Such is the rule under Neg. Inst. L. § 96, which provides that "a holder in due course * * * may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

⁹⁶ *Ante*, p. 229.

statutory defense, and that the statutes differ in different jurisdictions. In some states, for example, the statute expressly saves the rights of bona fide purchasers, and hence in these jurisdictions the defense of usury is not real, but merely personal.⁹⁷

104. FAILURE TO STAMP—Failure to affix a revenue stamp to a negotiable instrument is sometimes by statute made a real defense.

Failure to stamp a bill or note in accordance with the requirements of a revenue law imposing a penalty for such failure, and declaring that instruments, if not stamped, shall not be admissible in evidence, has been held in England to be a real defense.⁹⁸ Thus, where a bill was declared on as drawn in Bombay, it was held that the acceptor could show that it had been drawn in England, and hence was not receivable in evidence for want of being stamped as an inland bill, although the plaintiff was an innocent indorsee, for value, without notice.⁹⁹ Whether failure to stamp is a real defense depends, of course, upon the construction of the particular statute. Under the federal act of July 1, 1862, it was held that only fraudulent omissions rendered the instrument inadmissible in evidence,¹ and that the defense that the instrument was not stamped till after it was issued was not available against a bona fide purchaser who received it after it was stamped.² The provision against

⁹⁷ *Robinson v. Smith*, 62 Minn. 62, 64 N. W. 90; *Rand. Com. Paper*, § 525.

⁹⁸ *Bennison v. Jewison*, 12 Jur. 485; *Ex parte Manners*, 1 Rose, 68; *Bartlett v. Smith*, 11 Mees. & W. 483. As to conflict of laws, see *ante*, p. 247.

⁹⁹ *Bennison v. Jewison*, 12 Jur. 485.

¹ *Campbell v. Wilcox*, 10 Wall. 421, 19 L. Ed. 973; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Dudley v. Wells*, 55 Me. 145; *Whigham v. Pickett*, 48 Ala. 140; *State v. Hill*, 30 Wis. 416; *Cabbott v. Radford*, 17 Minn. 320 (Gil. 296).

² *Sperry v. Horr*, 32 Iowa, 184; *Latham v. Smith*, 45 Ill. 25; *Chaffe v. Ludeling*, 27 La. Ann. 607.

the reception of the instrument was in most jurisdictions held to apply only to the federal, and not to the state, courts, for the reason that for congress to prescribe rules regulating the administration of justice by the state courts would be to trench upon the independent existence of the state governments.³ Similar rulings have been made under the so called "War Revenue Act," which took effect July 1, 1898,⁴ and which follows in its general features the earlier act. A discussion of the various, and often conflicting, decisions involving the construction and effect of the federal revenue laws is beyond the scope of this book.⁵

105. ALTERATION—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.⁶

The reason that a material alteration of a negotiable instrument discharges a party who has not consented thereto is founded upon what is or was deemed to be public policy,

³ Carpenter v. Snelling, 97 Mass. 452; People v. Gates, 43 N. Y. 40; Griffin v. Ranney, 35 Conn. 239; Bowen v. Byrne, 55 Ill. 487; Sammons v. Halloway, 21 Mich. 162, 4 Am. Rep. 465. Contra: City of Muscatine v. Sterneman, 30 Iowa, 526, 6 Am. Rep. 685; Chartiers & Robinson Turnpike Co. v. McNamara, 72 Pa. 281, 13 Am. Rep. 673.

⁴ Dawson v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841. See, also, People ex rel. Consumers' Brewing Co. of New York v. Fromme, 35 App. Div. 459, 54 N. Y. Supp. 833; Loring v. Chase, 26 Misc. Rep. 318, 56 N. Y. Supp. 312.

⁵ Rand. Com. Paper, §§ 209-215; Daniel, Neg. Inst. §§ 118-127.

⁶ This is the language of N. I. L. § 124. This section seems to change the pre-existing law in American jurisdictions in which it has been adopted in at least one important respect. Professor Ames, Mr. Charles L. McKeehan, and Judge Lyman D. Brewster, in their comments on the N. I. L., all agree that this section prevents recovery by a holder not in due course upon an instrument altered by a stranger, contrary to the rule formerly prevailing in the United States. Brannan, Anno. N. I. L. (2d Ed.) pp. 216, 218, 280-282, 296. To this effect is Pensacola State Bank v. Melton (D. C.) 210 Fed. 57 (N. I. L.). But in Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49 (N. I. L.), the

the law imposing this severe penalty as a safeguard against tampering with written instruments.⁷ The alteration is, of course, inoperative as such, for an alteration of the instrument, or, in other words, the substitution of a new contract, could be effected only by the consent of the parties. The alteration, however, by force of a positive rule of law, is operative to nullify the instrument, even as against a bona

court, through Morton, J., said obiter: "The statute enacted in this state is the same in substance and effect as that adopted by the Conference of Commissioners on Uniformity of Laws, which met at Detroit in 1895, and has already been enacted in fifteen states (14 Harv. Law Rev. 241, December, 1900, by Professor Ames); and although it is largely copied from the English act, and is in many of its provisions an almost, if not quite, verbatim copy of that act, it would seem not unreasonable to suppose that it was the intention of the framers of the American act that section 124 should be construed according to the law of this country rather than that of England." See comments on this dictum by Mr. Chas. L. McKeehan, reprinted in Brannan, Anno. N. I. L. (2d Ed.) pp. 280-282. It has also been said with respect to section 124, N. I. L.: "The right, recognized by some courts, of a holder who has innocently altered an instrument to restore it to its original condition and to recover thereon, seems to be taken away by this section." Brannan, Anno. N. I. L. (2d Ed.) 125. But under, as well as before, the N. I. L. the intention accompanying the making of marks upon the face of the instrument is an important consideration in determining whether or not such marks constitute a material alteration. Thus under the Canadian Bills of Exchange Act it has been held that writing in lead pencil the address of an indorser under his signature, with no intention of changing his liability, but as a memorandum for the convenience of the bank, was not a material alteration. *Merchants' Bank of Canada v. Brown*, 86 App. Div. 599, 83 N. Y. Supp. 1037. Compare *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (N. I. L.). It has also been said that section 124, N. I. L., should not to be construed as preventing a recovery on the debt for which it was given, where the alteration was not made with wrongful intent. *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49 (N. I. L.), semble. See *Mitchell v. Reed's Ex'r (Ky.)* 106 S. W. 833. Of course, where a party consents to an alteration, his liability is not destroyed thereby. *Olive Street Bank v. Phillips* (Mo. App.) 162 S. W. 721 (N. I. L.); *Robertson v. Com. Sec. Co.*, 152 Ky. 336, 153 S. W. 450 (N. I. L.); *Iowa City Bank v. Claypool*, 91 Kan. 248, 137 Pac. 949 (N. I. L.).

⁷ *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *Angle v. Northwestern L. Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

fide purchaser.⁸ Thus, if an action were brought, based upon the instrument as attempted to be altered, the defendant would have a perfect defense by simple denial of execution of the instrument declared on. In an action based upon the original instrument, on the other hand, the defense strictly would be, not by way of denial, but by pleading the alteration, whereby the instrument, although actually executed by defendant, had been rendered a nullity.

In England the rule that alteration nullifies the instrument has been carried to extreme limits; and upon the ground that the party seeking to enforce must preserve the integrity of the instrument it has been held that the rule applies even though the alteration be the act of a stranger.⁹ In the United States an early departure from the severity of this rule was taken, and it has been generally held that an alteration by a stranger is a mere spoliation or trespass, and does not deprive the holder of his right to enforce the instrument.¹⁰ This is in accord with the fundamental prin-

⁸ *Master v. Miller*, 4 Term R. 320, 2 H. Bl. 140; *Burchfield v. Moore*, 3 El. & Bl. 683; *Walt v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. 564, 32 Atl. 730, 47 Am. St. Rep. 929; *Exchange Nat. Bank v. Bank of Little Rock*, 7 C. C. A. 111, 58 Fed. 140, 22 L. R. A. 686. As to the effect of the N. I. L., see p. 322, note 16, *infra*.

⁹ *Davidson v. Cooper*, 11 Mees. & W. 795, 13 Mees. & W. 343; *Pattinson v. Luckley*, L. R. 10 Exch. 330, 44 Law J. Exch. 180; *Pigot's Case*, 11 Coke, 27.

¹⁰ *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746; *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Nichols v. Johnson*, 10 Conn. 192; *Wickes' Lessee v. Caulk*, 5 Har. & J. (Md.) 36; *Den ex dem. Wright v. Wright*, 7 N. J. Law (2 Halst.) 176, 11 Am. Dec. 546; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299. See, also, *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *Hunt v. Gray*, 35 N. J. Law, 227, 10 Am. Rep. 232; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *DRUM v. DRUM*, 133 Mass. 568, *Moore Cases Bills and Notes*, 169; *White Sewing Mach. Co. v. Dakin*, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313. As to the effect of the N. I. L., see p. 318, note 6, *supra*. The authorities are divided as to the question upon whom rests the burden of proof when an alteration is apparent on the face of the in-

ciples of contract. Equally so is the rule that alterations made with the consent of the parties, or which do not change the effect or tenor of the instrument, do not affect the validity. If the parties consent upon a new consideration it is a new contract, and therefore in itself valid. Where there is no benefit derived from either party by the change, and yet they have knowledge of and assent to the change, each party makes the person making the change his agent, and ratifies his act.¹¹ Where the legal effect of the instrument is not changed by an alteration, the alteration is immaterial. The liability sought to be enforced against the party is the one which he in the first place assumed. The fact that the verbiage or appearance of the instrument is changed is unimportant. The courts look to the obligation, and, if that be unaltered in effect, then it is enforced.

strument. Daniel, Neg. Inst. §§ 1417-1421a. In *Ofenstein v. Bryan*, 20 App. D. C. 1 (N. I. L.), a promissory note was offered in evidence which upon its face and to the naked eye showed alterations to have been made in it. The trial court, upon inspection of it, held that there were visible and patent alterations, and therefore refused to admit it in evidence until the plaintiff offered some evidence tending to explain its condition. The appellate court held that this was not error. Compare *Towles v. Tanner*, 21 App. D. C. 530 (N. I. L.). In *Wood v. Skelley*, 198 Mass. 114, 81 N. E. 872, 124 Am. St. Rep. 516 (N. I. L.), the court held that the trial court did not err in admitting in evidence an instrument which appeared to have been altered, where there was direct testimony that the instrument was in the same condition as when signed by the defendant. The court intimated that for the trial court to have done otherwise would have been error, but laid down the following rule: "The proper practice, when a note is offered which appears to have been altered, is for the presiding judge to determine, upon inspection and in view of the state of the evidence at the time, whether further proof in explanation of the alterations shall then be required before the instrument be admitted. His action in that respect rests upon his sound discretion, to the exercise of which no exception lies."

¹¹ *National State Bank v. Rising*, 4 Hun (N. Y.) 793; *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577; *President, etc., of Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Huntington v. Ballou*, 2 Lans. (N. Y.) 120; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Camden Bank v. Hall*, 14 N. J. Law, 583; *Jackson v. Johnson*, 67 Ga. 167; *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769.

The courts will not allow justice to be obstructed for the light reason that the form of the agreement is altered when its substance remains. But, provided the alteration be material, it is not of importance whether the intent with which it was made was fraudulent or innocent.¹² A distinction in respect to the intent, however, is to be observed. While it is conceded that any material alteration, however innocent the intent, avoids the instrument, and, moreover, that where the holder has been guilty of making a fraudulent alteration, he cannot recover even upon the original consideration for which the bill or note was given,¹³ yet it has been held by many cases that, if the alteration was innocently made by the holder, he can recover upon the original consideration,¹⁴ provided the remedy over of the person sued has not been prejudiced by the alteration.¹⁵

It is of importance to observe that in those states which have adopted the Negotiable Instruments Law the effect of alteration upon the rights of innocent purchasers has been substantially changed by the provision that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."¹⁶ In other words, under this enactment alteration has ceased to be a real defense.

¹² Booth v. Powers, 56 N. Y. 22; Evans v. Foreman, 60 Mo. 449; Heath v. Blake, 28 S. C. 406, 5 S. E. 842; First Nat. Bank v. Fricke, 75 Mo. 178, 42 Am. Rep. 397; Eckert v. Pickel, 59 Iowa, 545, 13 N. W. 708; Vanauken v. Hornbeck, 14 N. J. Law, 178, 25 Am. Dec. 509. See, contra, Van Brunt v. Eoff, 35 Barb. (N. Y.) 501. See, also, p. 318, note 6, supra.

¹³ Meyer v. Huneke, 55 N. Y. 412; Smith v. Mace, 44 N. H. 553; Warder, Bushnell & Glessner Co. v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; Ballard v. Franklin Life Ins. Co., 81 Ind. 239; Walton Plow Co. v. Campbell, 35 Neb. 174, 52 N. W. 883, 16 L. R. A. 468.

¹⁴ Sloman v. Cox, 1 Cromp., M. & R. 471; Hunt v. Gray, 35 N. J. Law, 227, 10 Am. Rep. 232; Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Sullivan v. Rudisill, 63 Iowa, 158, 18 N. W. 856; Keene v. Weeks, 19 R. I. 309, 33 Atl. 446. As to the effect of the N. I. L., see § 105, supra.

¹⁵ Alderson v. Langdale, 3 Barn. & Adol. 660.

¹⁶ N. I. L. § 124; Thorpe v. White, 188 Mass. 333, 74 N. E. 592 (N.

106. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.¹⁷

The absence of a date upon a negotiable instrument at its inception, or the fact that it is postdated or antedated,

I. L.); Mutual Loan Ass'n v. Lesser, 76 App. Div. 614; 78 N. Y. Supp. 629 (N. I. L.); Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959 (N. I. L.); Bledsoe v. City Nat. Bank, 7 Ala. App. 195, 60 South. 942 (N. I. L.). But the bona fide holder can recover only where the defendant would be bound on the instrument if the altered part be restored to its condition before alteration. Thus, where the liability of the defendant on the instrument, had it been unaltered, could not have arisen in favor of the plaintiff, either in accordance with defendant's intention or by way of estoppel without the addition of a signature which was not in fact secured, no person can recover on the instrument. Such was the situation in First Nat. Bank of City of Brooklyn v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.). In that case the defendant indorsed a note made payable to herself and four others *jointly* and mailed it to the maker, who obtained the indorsements of three of the other payees, then erased the name of the other, and the word "Jointly," inserted her own name as payee, and indorsed and negotiated it for value. It was held that the defendant was not liable on the instrument to the plaintiff or holder for value, although the court assumed that the plaintiff had no notice of the alteration. But see Moskowitz v. Deutsch, 46 Misc. Rep. 603, 92 N. Y. Supp. 721 (N. I. L.). Compare Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134 (N. I. L.). Alteration should be distinguished from a change in the instrument which prevents inception. Barton Sav. Bank v. Stephenson (Vt.) 89 Atl. 639. This distinction seems to have been overlooked in Washington Finance Co. v. Glass, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.). As to who is a holder in due course

¹⁷ N. I. L. § 125. This section seems declaratory of the pre-existing law merchant.

may not be material upon the question of its validity.¹⁸ But when a date has once been inserted, and its time of payment has thus been fixed, such date is material, and cannot be altered without consent.¹⁹ The reason for this is,

within the meaning of section 124, permitting a recovery according to the original tenor of the instrument, see p. 441, note 40, Chapter VIII, infra. It has been held that, where the ordinary inspection of the instrument would show that it had been materially altered at some time, a holder who receives the instrument in this condition cannot be a holder in due course under section 52, N. I. L. Elias v. Whitney, 50 Misc. Rep. 328, 98 N. Y. Supp. 667 (N. I. L.); First Nat. Bank v. Barnum (D. C.) 160 Fed. 245 (N. I. L.). It has been said that Elias v. Whitney, *supra*, "reaches the same result as section 64 (1) of the Bills of Exchange Act, where the words 'but the alteration is not apparent' are interpolated." Brannan, Anno. N. I. L. (2d Ed.) 125. It is clear that under the B. E. A. the same conclusion would have been reached in the case of Elias v. Whitney, *supra*. But, in Leeds & Co. Bank v. Walker, 11 Q. B. D. 84, the court, through Denman, J., stated as one of the grounds of decision: "Section 64 only applies where the alteration is 'not apparent.' In the present case I think it was apparent. By the word 'apparent' I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point out to the holder, that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an 'apparent' one, even if it is not an obvious one to all mankind." It has been held that, where the indorsement took place in New York of a note made and payable in Ohio, the effect of a subsequent alteration (by providing for interest), made in New York by the payee with the consent of the maker, upon the liability of the indorser, was determined by the law of New York, and accordingly a plaintiff, who in good faith discounted the note in Ohio, after such alteration, could recover according to the original tenor against the indorser. Colonial Nat. Bank of Cleveland, Ohio, v. Duer, 108 App. Div. 215, 95 N. Y. Supp. 810 (N. I. L.). If in this case the maker had not consented to the alteration, the result would have been unfortunate, in that the indorser would not, upon taking up the note according to its original tenor, have had any recourse against the maker. This result suggests the desirability of determining the effect of alteration upon the liability of any of the parties according to one law.

¹⁸ See N. I. L. § 12.

¹⁹ Stephens v. Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; Walton v. Hastings, 4 Camp. 223; Jacobs v. Hart, 2 Starkie, 45; Outhwaite v. Luntley, 4 Camp. 179; Master v. Miller, 4 Term R.

in the words of Justice Swayne,²⁰ that the agreement is no longer the one into which the parties entered. Its identity is changed. Another is substituted. There is no longer the necessary concurrence of minds. To prevent and punish such tampering, the law does not permit the holder to fall back upon the contract as it was originally. In pursuance of a stern, but wise, policy, it annuls the instrument as to the party sought to be wronged. The date is obviously a material part of the order or promise. It indicates the time of its inception. It shows the time of its performance. And its alteration, if operative, would place a different liability upon the party sought to be charged. For much the same reason, an alteration in a note or bill which changes the time of its payment is material, and discharges those parties who did not authorize the change.²¹ This is true whether the payment is hastened or delayed. It is no argument that such acceleration or delay may be a

320 (in this case it was held that an alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be maintained upon it, even by an innocent holder for valuable consideration); Britton v. Dierker, 46 Mo. 592, 2 Am. Rep. 553; Owings v. Arnot, 33 Mo. 406; Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. In Langton v. Lazarus, 5 Mees. & W. 629, which was an action in assumpsit by the indorsee against the acceptor of a bill of exchange, it was pleaded as a defense that before the bill came due, and while it was "in full force and effect," the date was altered by the drawer, whereby it became void. The plea was held bad, but only for the reason that it did not allege the alteration to have been made after acceptance. N. I. L. § 125 (subd. 1).

²⁰ Wood v. Steele, 6 Wall. 80, 18 L. Ed. 725.

²¹ Lee v. Murdoch, 4 Pat. App. 261; Long v. Moore, 3 Esp. 155. note. In the case of Alderson v. Langdale, 3 Barn. & Adol. 600, the vendee of goods paid for them by a bill of exchange drawn by him on a third person; and, after it had been accepted, the vendor altered the time of payment mentioned in the bill, and thereby vitiated it. It was held that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and consequently that he could not recover for the goods sold. Miller v. Gilleland, 19 Pa. 119; Lewis v. Kramer, 3 Md. 265; Bathe v. Taylor, 15 East, 412; Benedict v. Miner, 58 Ill. 19; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Seibold v. Tatlie, 76 Minn. 131, 78 N. W. 967. N. I. L. § 125 (subd. 3).

benefit to the acceptor, maker, or indorsers, in any particular case. The rule also applies where the place of payment is obliterated, or where a place of payment is inserted, or where the place of payment is otherwise altered. Properly enough, the law does not permit even a bona fide holder to recover upon a bill or note so altered against the parties prior to the one making the alteration.²² The place, as well as the time, of payment, is an essential and material part of the contract entered into; for on their proximity or remoteness must depend, in point of time, the indorser's knowledge of nonpayment, which in most cases must be to him a matter of great importance, and he cannot be charged with liability unless payment of the instrument is demanded at the time when and the place where it is due; and, when this is changed without the indorser's consent, the alteration avoids the instrument.²³

The amount to be paid by the instrument cannot be changed, either by lessening or increasing it, without de-

²² Cowie v. Halsall, 4 Barn. & Ald. 197, 3 Starkie, 36; Rex v. Treble, 2 Taunt 328; Tidmarsh v. Grover, 1 Maule & S. 735; Nazro v. Fuller, 24 Wend. (N. Y.) 374; Sudler v. Collins, 2 Houst. (Del.) 538; Burchfield v. Moore, 25 Eng. Law & Eq. 123; Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 638; Macintosh v. Haydon, Ryan & M. 362; Hill v. Cooley, 46 Pa. 259; White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Oakey v. Wilcox, 3 How. (Miss.) 330. As to the effect of the N. I. L., see p. 322, note 16, supra.

²³ Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; Nazro v. Fuller, 24 Wend. (N. Y.) 374. N. I. L. § 125 (subd. 3); First Nat. Bank v. Barnum (D. C.) 160 Fed. 245 (N. I. L.), where the defendant indorsed the notes in blank except as to the place of payment which was altered. But, of course, where there is no change in the place of payment, although it may be designated by another name, there is no alteration. Thus, where a note was made on a printed blank giving the name of a bank as the place of payment, which bank to the knowledge of most, if not all, of the makers, had previously changed from a state to a national bank, changing its name, but continuing in business in the same building, the fact that the name of such bank was correspondingly changed in the note after its execution, without the knowledge of the makers, did not constitute a material alteration. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166 (N. I. L.).

stroying the contract.²⁴ Under this rule there can be no lessening or increasing the amount of principal,²⁵ nor adding words varying the interest to be paid on a bill or note, either by changing the per cent. or adding interest where the bill or note did not before provide for any;²⁶ nor by

²⁴ N. I. L. § 125 (subd. 2). Thus adding a lower rate of interest than the note originally would have carried is a material alteration. New York Life Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 382, 12 Ann. Cas. 677 (N. I. L.). See Washington Finance Co. v. Glass, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.).

²⁵ Goodman v. Eastman, 4 N. H. 455; Bank of Commerce v. Union Bank, 3 N. Y. 230; Stephens v. Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485. In the case of Citizens' Nat. Bank v. Richmond, 121 Mass. 110, the facts were as follows: A note for \$500 was indorsed for the maker's accommodation. Afterwards the maker, by means of chemicals, removed the original amount of the note, and inserted a larger amount, for which he got the note discounted. Before the note was due, the alteration was discovered, and the original writing restored. The note was protested, both as a \$500 note and a \$2,000 note, and two notices were accordingly sent. It was held that the indorser was not liable, never having indorsed the \$2,000 note, and the \$500 note having been rendered a nullity. See, also, Young v. Grote, 4 Bing. 253. A check drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, in such a manner that no one in the ordinary course of business could observe it. The banker paid to the holder this larger sum. It was held that he could not charge the customer beyond the sum for which the check was originally drawn. Hall v. Fuller, 5 Barn. & C. 750. In the case of Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305, it was held that where a check which had been altered as to name of payee, date, and amount had been certified, and afterwards paid by the plaintiff, such amount could be recovered back as money paid through mistake. See *infra*, p. 589.

²⁶ Boalt v. Brown, 13 Ohio St. 364; Waterman v. Vose, 43 Me. 504; Lee v. Starbird, 55 Me. 491; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Dewey v. Reed, 40 Barb. (N. Y.) 16; Brown v. Jones, 3 Port. (Ala.) 420; Whitmer v. Frye, 10 Mo. 348; Fay v. Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752; Patterson v. McNeely, 16 Ohio St. 348; Witteman v. Glass (Sup.) 117 N. Y. Supp. 940 (N. I. L.); McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372. In this case a promissory note was indorsed by the defendant, but with time and place of payment left blank. Upon its delivery to him, the maker, having

altering the currency in which payment is to be made, nor, if the bill or note is payable in merchandise, by modifying the character or quality of the goods.²⁷ The reason for these rules is that, if the amount to be paid is increased or lessened, the identity of the contract is destroyed. If interest is added, it adds to the burden borne by the parties; if diminished, the effect of the contract is changed. The question to be determined is whether the words added or stricken out were mere surplusage, or whether they were material to the obligation assumed by the parties to the contract.²⁸

The doctrine of the so-called Pigot's Case,²⁹ which is the source of the doctrine of alteration, has been extended to every situation where instruments are presented or sought to be used as evidence for the enforcement of an unexecuted obligation or contract. If there is added or withdrawn another maker or drawer, or if a person signs or withdraws his name as a surety to a note or bill after it is executed, such addition or withdrawal attempts to create

filled in the blanks, added the words "with interest." It was held that, by delivery to him, the maker was authorized to fill in the blanks as to time and place, as he wished, but that the addition of the "with interest" was not authorized, and was such a material alteration as would invalidate the note, unless proof of authority beyond the mere fact of delivery be shown. "The addition of the words 'with interest' increased the liability of the indorser; and the maker had no more right to add those words than he had to increase the sum for which the note was given by adding the amount of the interest to it for the time the note had to run." Per Church, C. J. Accord: *Useeof v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290 (N. I. L.), where the instrument, after being signed by the defendant, contained several blanks. The fact that the alteration is so clumsily done that it is not likely to deceive any one is immaterial. *Lawless v. State*, 114 Wis. 189, 89 N. W. 891 (N. I. L.).

²⁷ *Darwin v. Rippey*, 63 N. C. 318; *State v. Cilley*, quoted in *Martendale v. Follet*, 1 N. H. 97; *Schwalm v. McIntyre*, 17 Wis. 232.

²⁸ *Gardner v. Walsh*, 5 El. & Bl. 83; *Suffell v. Bank of England*, 9 Q. B. Div. 555. One test is whether the legal damages contemplated by the parties were the same as those to be awarded by the contract in its changed condition. *Church v. Howard*, 17 Hun (N. Y.) 5.

²⁹ 11 Coke, 27.

a new contract, and hence is a material alteration.⁸⁰ In such case, too, it is not to the point that the alteration be or be not to the prejudice of the party against whom the liability is sought to be enforced. The courts will not sit in judgment upon the question whether it be to the prejudice of the party aggrieved or not.⁸¹ This is also true where the operation or effect of the instrument is changed, and it operates differently from the original instrument.⁸² If, for

⁸⁰ Clark v. Blackstock, Holt, N. P. 474; *Ex parte White*, 2 Deac. & C. 334; *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25; *Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479; *Gardner v. Walsh*, 32 Eng. Law & Eq. 162. For a stranger to irregularly indorse after the indorsement of the payee does not constitute a material alteration, because such indorsement does not purport in any way to change the relations of the parties. *Ensign v. Fogg* (Mich.) 143 N. W. 82 (N. I. L.).

⁸¹ *Chappell v. Spencer*, 23 Barb. (N. Y.) 584; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 South. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832, Johns. Cas. Bills & N. 154.

⁸² N. I. L. § 125. In *Hoffman v. Planters' Nat. Bank*, 99 Va. 480, 39 S. E. 134 (N. I. L.), the evidence tended to show that the note in suit was handed to the defendant by the maker of the note for which this note was to be a renewal and on which prior note the defendant was an indorser for the accommodation of such maker; that the note in suit when so handed to defendant contained defendant's name as payee, but was blank as to a maker; that the defendant (whether or not by mistake does not appear) signed as maker; that the note in this condition was offered to the plaintiff bank by the accommodated party for discount; that the clerk in the bank crossed out the name of the defendant as payee, inserted that of the accommodated party, and upon indorsement by that party discounted it. The trial court directed the jury to find for the plaintiff holding that there was no evidence of a material alteration. The judgment on this verdict for the plaintiff was reversed on the ground that the liability of a maker is different from that of an indorser. In *Birmingham Trust & Sav. Co. v. Whitney*, 95 App. Div. 280, 88 N. Y. Supp. 578 (N. I. L.), one ground for affirming the judgment for the plaintiff was that where the payee indorser sends a bill to the indorsee, with the understanding that the indorsee is to receive the paper as cashier of a trust company, it is not a material alteration for the indorsee to add this description to his name, as indorsee, on the instrument. In *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636 (N. I. L.), it was held that the placing of a stamp upon an unstamped note, in order that it might comply with the federal revenue law, is not a material alteration under section 125, N. I. L., where there is no evidence that the stamp

example, a promissory note, negotiable, and for the payment of a sum of money absolutely on its face, is modified as to its negotiability, so that it is converted into a special contract, the alteration is material, and avoids the instrument.³³ Where there are memoranda upon the instrument which qualify it, and are intended as a substantive part of it, and these are changed, the alteration is material.³⁴ So, also, ingrafting upon a joint note a several obligation, or changing a joint and several to a joint note, destroys the operation of the original contract, and renders it void.

Same—Negligence Facilitating Alteration—Estoppel

It is proper to add to the foregoing rules a statement of a limitation which has been recognized in many cases, but which has been adversely criticised or repudiated in others.

was originally omitted with intent to defraud the government, and where the absence of such a stamp does not affect the admissibility of the note in evidence in the courts of Massachusetts, although it would affect its admissibility in federal courts, where as in this case the note was made and apparently was to be paid in Massachusetts. The court said: "In our opinion, the question whether there was or was not a material alteration of this note, which was made in Massachusetts and apparently was to be paid in Massachusetts, must be determined by the laws administered in the courts of Massachusetts. *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600."

³³ *Hartley v. Wilkinson*, 4 Maule & S. 25; *Cholmeley v. Darley*, 14 Mees. & W. 343; *Leeds v. Lancashire*, 2 Camp. 205.

³⁴ *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Johnson v. Heagan*, 23 Me. 329; *Burchfield v. Moore*, 3 El. & Bl. 683; *Simpson v. Stackhouse*, 9 Pa. (9 Barr) 186, 49 Am. Dec. 554; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674. In the case of *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395, a memorandum which was written under a note, and by which the obligation was qualified, was shown to have been detached, and it was held that by such alteration a note, even though in the hands of a bona fide holder, is vitiated. "If it formed a part of the original contract, it was a material alteration to detach the memorandum, and leave the note as if it had been absolute. And it is a principle well settled that such an alteration avoids the entire obligation." Per Campbell, C. J. As to the effect of the N. I. L., see p. 322, note 16, supra. See, also, *Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263, 133 Am. St. Rep. 623 (N. I. L.), and *Nottingham v. Ackiss*, 107 Va. 63, 57 S. E. 592 (N. I. L.).

The rule, briefly stated, is that where the party seeking to defend on the ground of alteration has by his negligence made the alteration possible—as where he has left space before or after the words or figures expressing the amount, or written a part of the contract in such a way that it could be detached without exciting suspicion, or written part of the instrument with pencil—the negligent party will be liable upon the instrument as altered to a bona fide holder.⁸⁵ This rule, if it can be supported, must rest upon the

⁸⁵ Young v. Grote, 4 Bing. 253; Pagan v. Wylie, 2 Mor. Dict. 1680; Van Duzer v. Howe, 21 N. Y. 538; Isnard v. Torres, 10 La. Ann. 103; Harvey v. Smith, 55 Ill. 224 (condition written in pencil); Yocom v. Smith, 63 Ill. 321, 14 Am. Rep. 120; Seibel v. Vaughan, 69 Ill. 257; Noll v. Smith, 64 Ind. 511, 31 Am. Rep. 131; Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 180 (N. I. L.), semble; Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134, semble. In each case it must be determined whether or not the conduct of the party in question was negligent within the meaning of this rule, and if such negligence, if any, will have caused loss to the holder if he be not permitted to recover on the instrument as altered. These seem to be questions of fact, except where certain acts are regarded in the law merchant as necessarily negligent with respect to some consequences to some persons. In Brown v. Reed, 79 Pa. 370, 21 Am. Rep. 75, the note in question had formed originally part of a contract so drawn that by cutting off a part of it a negotiable note was left. It was held that whether defendant was negligent in signing the contract was a question of fact for the jury. But see Greenfield Sav. Bank v. Stowell, 123 Mass. 203, 25 Am. Rep. 67; Cape Ann Nat. Bank v. Burns, 129 Mass. 596; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395. In Lanier v. Clarke (Tex. Civ. App.) 133 S. W. 1093, the evidence showed that the defendant maker, at the time of making, wrote in lead pencil on the margin a statement as to the consideration for which the note was given, which the court held would have given notice of the failure of consideration to the plaintiff; that such statement was erased before the plaintiff acquired the instruments. The trial court charged the jury that, if the plaintiff did not know or have cause to know of the alteration before the note came into his hands, the plaintiff should recover. A judgment on a verdict for the plaintiff was reversed. It will be noted that the trial court took the question of negligence from the jury, and that therefore a reversal of the judgment decided only that the defendant had not been guilty of negligence as a matter of law, and that the evidence did not so clearly show negligence as to justify the court in taking the question

Broad principle that a man cannot complain of the consequences of his own default against a person who has been

from the jury. The court, however, put its decision upon a broader ground, saying: "Strictly speaking, the doctrine of estoppel ought not to apply except in those cases where the person making the alteration is in some way clothed with agency, as by an apparent authority to make the change. Any material alteration in an instrument evidencing a pecuniary liability is 'forgery,' and it cannot be said that the maker of a negotiable or non-negotiable note ought to anticipate that any one would commit a forgery, and, therefore, be required to so execute his instrument that a forgery would be difficult, if not impossible." In *Timbel v. Garfield Nat. Bank*, 121 App. Div. 870, 106 N. Y. Supp. 497 (N. I. L.), the evidence tended to show that the plaintiff let her husband draw the check payable to his own order; that he drew it so that there were blank spaces at the left of the words and figures stating the amount; that she signed it in that condition; that the bank, the defendant in this action to recover an alleged balance of deposit, used more than usual diligence in paying the check for the full amount as altered. The trial court directed a verdict for the plaintiff. Judgment on this verdict was reversed, one of the grounds for reversal being that the court should have left to the jury the question whether or not the plaintiff was negligent in drawing the check. The court said that if the jury so found the defendant should be relieved from repaying the amount to her. In *NATIONAL EXCH. BANK OF ALBANY v. LESTER*, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402, 16 Ann. Cas. 770 (N. I. L.), Moore Cases Bills and Notes, 171, the only evidence tending to show negligence was that, when the *note* in suit was signed by the defendant as *irregular accommodation indorser*, there were spaces such as to make easy subsequent unapparent alteration as to amount. The trial court instructed the jury that if they found that the defendant was careless and negligent in signing his name while there were spaces thereon which invited alteration, they should find for the plaintiff. On a verdict for the plaintiff judgment was entered. This was an appeal from a judgment of the Appellate Division, affirming the judgment of the trial court and the order of the trial court denying a motion for a new trial. The decision of the trial court was reversed and a new trial ordered. The court stated that the instruction of the trial court was erroneous; that an *indorser* was under no such duty. But the court in granting a new trial did not decide more than that the evidence in this case was not sufficient to sustain a finding of negligence toward the plaintiff on the part of the defendant. So in *Scholfield v. Londesborough*, [1896] H. C. 514, the actual decision of the House of Lords was not that under no circumstances can a party be estopped by negligence from denying liability on the instrument as altered, but was only that the evidence in the case was not such as to require a finding that the defendant had acted negligently toward

misled by that default without default of his own; in other words, upon the principle of estoppel.²⁶

the plaintiff. The action was by the holder against the acceptor of a bill of exchange. The defendant paid into court £500, the amount of the bill when accepted by him. The evidence tended to show that, when the bill was presented to him for acceptance by the drawer, it called for £500; but the stamp on the bill was for a much larger amount than was necessary for a £500 bill, and there were spaces before the words and figures expressing the amount which made subsequent unapparent alteration easy. Lord Halsbury, L. C., in commenting on this evidence, said: "But when it is said that spaces were left, it is to be remembered that there was nothing unusual or calculated to excite attention in the intervals between the written words and figures by which the bill was made." The court before whom the case was tried without a jury accepted the view that there was a duty to use reasonable care in drawing an instrument so as not to facilitate alteration, but concluded that in this case there was not a breach of this duty, that is, negligence by the defendant toward the plaintiff, and gave judgment for the defendant. This judgment was affirmed in the Court of Appeals by a divided court. The two Lord Justices constituting the majority went further than the trial court and declared that the law merchant does not impose upon every acceptor of a negotiable bill of exchange the duty of taking reasonable precautions to prevent inconspicuous alterations. In the House of Lords the appeal from this judgment of affirmance was dismissed, and the view of the majority of the Court of Appeals expressly approved. Lord Halsbury, L. C., and Lord Watson took pains to distinguish the relation of the acceptor to subsequent holders from that of the drawer of a check to the drawee bank. As to the effect of the B. E. A., Lord Watson said (pp. 542, 543): "I desire to add that, had

²⁶ Halifax Union v. Wheelwright, L. R. 10 Exch. 183, per Cleasby, B. There has been much conflict of opinion as to the principle on which Young v. Grote, 4 Bing. 253, and like cases rest, if, indeed, they are to be supported. The principle of avoiding circuituity of action has been suggested, but the negligence of the person issuing the instrument is not of such nature as to give rise to a cross action in favor of the party misled. See 1 Amer. Cas. Bills & N. 491, note 1. See, also, Knoxville Nat. Bank v. Clark, 51 Iowa, 264, 1 N. W. 491, 33 Am. Rep. 129; Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371; Exchange Nat. Bank v. Bank of Little Rock, 7 C. C. A. 111, 58 Fed. 140, 22 L. R. A. 686; Rand. Com. Paper, §§ 187, 1770; Daniel, Neg. Inst. §§ 1405-1409. Cases where spaces are negligently left so that it is thereby made possible to make a fraudulent alteration are to be distinguished from those in which the blanks are left for the purpose of being filled in. McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372. See post, p. 342.

107. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.⁸⁷

Forgery means either falsely making, counterfeiting, altering, erasing, or obliterating a genuine negotiable instru-

your lordships thought fit to accept the legal argument of the appellant, I should not have been of the opinion that the claim which he makes in this action was excluded by section 64 of the Bills of Exchange Act. That clause admits an action for the altered amount of the bill, when the acceptor has authorized the alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorize the fraud committed by Scott Saunders." The decision in Imperial Bank v. Bank of Hamilton, [1903] A. C. 49, goes no farther than that in Scholfield v. Londesborough, [1896] A. C. 514. But in the former case Lord Lindley for their lordships said (p. 54): "There can be no doubt that the condition of the check when certified afforded opportunity for this fraudulent alteration; and if the principle laid down in Young v. Grote could still be acted upon the Bank of Hamilton would, as between themselves and an innocent holder for value, be estopped from denying that the cheque was a certified cheque for £500. But after the decision of the House of Lords in Scholfield v. Earl of Londesborough, it was hopeless to contend that by the law of England the Bank of Hamilton was not at liberty to prove that the cheque had been fraudulently altered after it had been certified by the bank." In Col. Bank of Australia v. Marshall, [1906] A. C. 559, P. C., the action was to recover a balance of account in the defendant bank. The plea was that checks were drawn without reasonable care, and that such lack of care invited the alterations which took place, and caused the defendant, while acting with reasonable care, to pay the face amounts of the instruments as altered. At the trial the evidence showed that the two plaintiffs and one Meyer were executors of an estate; that the defendant bank accepted the deposit

⁸⁷ N. I. L. § 23.

ment, in whole or in part, or the false making or counterfeiting of the signature of a party thereto, with intent to subject to withdrawal by check signed by all three; that the course of business was for Meyer to draw the checks and mail them to the plaintiff Marshall, who signed and mailed them to the plaintiff Day, who signed and then mailed to Meyer, who then signed; that Meyer drew the checks in question in such a way that there were margins at the left of the figures and the writing stating the amounts; that the words denoting the amount began with capital letters; that Meyer was a person with whom the plaintiffs had had dealings for years, and whose honesty they had no reason to doubt; that in signing these checks Meyer inserted figures and words increasing the amounts; that the bank, acting with reasonable care, paid the cheques as thus altered. The Chief Justice who presided at the trial in the Supreme Court of Victoria charged the jury that if the action of the plaintiffs amounted to negligence inducing or causing opportunity to a person to commit a forgery, and "such negligence as in the opinion of the jury ought to preclude him from complaining of the fact that the banker paid the altered check," the plaintiffs should not recover. The jury found a verdict for the defendant bank, on which judgment was entered. This judgment was affirmed by the full court. On appeal the High Court of Australia reversed the decision and dismissed the suit, on the ground that the instruction of the trial court was not according to law and there was no evidence of negligence proper to go to the jury. This was an appeal to the Privy Council. The appeal was dismissed. The court expressly approved the conclusion that there was no evidence to go to the jury of any breach of duty toward the defendant, although it admitted the existence of an obligation to use some diligence to prevent loss to the drawee bank through unapparent alteration. The court approved Scholfield v. Londesborough as deciding that merely leaving spaces beside words or figures stating the amount could not be found, without more, to constitute a breach of duty toward any future holder. It will be noted, however, that there was in this case no evidence of an "agreed or established course of dealing between the parties," nor of what precautions against alteration were usually taken in that jurisdiction. The decision, therefore, seems consistent with Timbel v. Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. Supp. 497, and with Young v. Grote, 4 Bing. 253. In Trust Co. of America v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367, 369 (N. I. L.), the court said: "The question before us is entirely one concerning the duties of a depositor to his bank. That a depositor owes a real duty of care to the bank has frequently been decided, and this duty is greater than that which the maker of an instrument owes to subsequent holders for value. The purchaser of a negotiable instrument may take it or not at his option, and usually, at least to some extent, relies upon the responsibility of the last holder. A bank, however,

defraud.³⁸ Its essential elements are intent to defraud,³⁹ the forging of the instrument, and its utterance or delivery by the forger.⁴⁰ In some of its aspects it is closely akin to alteration, but is distinguished from it in that its essential element is fraudulent intent, while material alterations may be innocently made. If innocently made, though the alteration be material, recovery can be had upon the original consideration, but, if fraudulently made, and the alteration be material, no recovery can be had upon the instrument or upon the consideration.⁴¹ This rule, though harsh, is deemed wise, all things considered, because forgery ought to shut the doors of courts to the forger. It is deemed the wisest policy to punish his fraud by causing him to lose all remedy for the enforcement of his rights.

Forgery creates no legal right or obligation against the party whose name is forged, even though the instrument be sought to be enforced by a purchaser for value without notice.⁴² The forgery is in no wise the legal act of this party.

must at its peril pay out the money deposited if the depositor directs him to do so." See *City of Newburyport v. First Nat. Bank*, 218 Mass. 304, 103 N. E. 782 (N. I. L.). See, also, *Iowa City Bank v. Claypool*, 91 Kan. 248, 137 Pac. 949 (N. I. L.).

³⁸ Pen. Code N. Y. § 520.

³⁹ Daniel, Neg. Inst. § 1349; Edw. Bills & N. § 288; People v. D'Argencour, 32 Hun (N. Y.) 178, affirmed 95 N. Y. 624; Phelps v. People, 72 N. Y. 371.

⁴⁰ Daniel, Neg. Inst. § 1350.

⁴¹ *Booth v. Powers*, 56 N. Y. 22; *Meyer v. Huneke*, 55 N. Y. 412; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Trow v. Glen Cove Starch Co.*, 1 Daly (N. Y.) 280; *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Atkinson v. Hawdon*, 2 Adol. & El. 628 (in this case it was held that if the drawer sues the acceptor upon the bill, and fails in consequence of having altered the bill in a material part, he may still recover upon the counts on the original consideration); *Hunt v. Gray*, 35 N. J. Law, 227, 10 Am. Rep. 232; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766. See, contra, *Martendale v. Follet*, 1 N. H. 99; *Bigelow v. Stilphen*, 35 Vt. 525. *Ante*; p. 319.

⁴² In the case of *Smith v. Sheppard*, Chit. Bills (10th Ed.) —, note, it was said by Lord Mansfield that "he that takes a forged bill must abide by the consequence, for the man whose name is forged knows nothing of it." Of course, where reliance upon the forged signature

It is the act of some one else personating him without authority. In case of an indorser there is the further reason that legal title to an instrument negotiable by indorsement can be transferred only by the indorsement of the legal holder. So, that, except in case of ratification or estoppel,⁴³ in no event is a maker, acceptor, drawer, or indorser liable upon an instrument forged as to him. Ratification and estoppel, however, take the case from the operation of the rule. Ratification means the adoption by a party of a forged signature as his own. Estoppel means the refusal to allow a party to deny a forged signature purporting to be his because by his words or conduct he has induced some other party to the instrument to act to his detriment upon the belief that the forged signature is a valid one.⁴⁴ Rati-

as genuine is not necessary to show title to the instrument in the plaintiff, the fact that such signature was forged cannot prevent a recovery on the instrument. *Jett v. Standafer*, 143 Ky. 787, 137 S. W. 513 (N. I. L.). And the forgery of the signature of one joint and several maker *as such* furnishes no defense to a joint and several maker whose signature was not forged. Thus, where a joint and several maker signs with knowledge that the signature of another joint and several maker has been forged, he is clearly liable on the instrument to the payee, who in good faith paid value on the instrument. *Beem v. Farrell*, 135 Iowa, 670, 113 N. W. 509 (N. I. L.).

⁴³ As to estoppel of acceptor, see ante, p. 197.

⁴⁴ Where an agent has ostensible authority to sign the instrument for his principal, although he has been directed by the principal not to do so, an innocent third person dealing with the agent in reliance upon such apparent authority, or a third person who acquired the instrument as a holder in due course relying upon the genuineness of the signature, can recover on the instrument against the principal. Whether this contractual liability rests upon the principle of estoppel by misrepresentation, or upon the principle that contractual rights arise by reason of manifested, not secret, intention, is not clear. In *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780 (N. I. L.), an action of assumpsit to recover the amount of checks alleged to have been paid without authority from the plaintiff depositor by the defendant bank, the plaintiff's statement alleged that the checks in question were drawn by a clerk of the plaintiff to a payee to whom he had no intention of delivering them; that he indorsed them in the name of that payee and delivered them to R. M. Miner & Co. in connection with a gambling transaction; that R. M. Miner & Co. deposited these checks with the R. E. Tit. & Trust Co.; that the defendant, relying upon the guaranty

fication binds the party because, according to the general principles of contract as adopted in this country, a ratification made with full knowledge binds a principal although

by the R. E. Tit. & Trust Co. of the indorsements upon three of the checks and upon its indorsement of the fourth, paid each of said checks to it through its collection agents; that the R. E. Tit. & Trust Co. had actual knowledge of the character of the business of Miner & Co. The affidavit of defense alleged that the defendant paid the checks without any knowledge or notice of any kind of the fraud of the clerk until long after the checks were paid, and this was also true of R. M. Miner & Co. and the R. E. Tit. & Trust Co., and that the said trust company had no knowledge of any such character of the business of R. M. Miner & Co. as alleged in the complaint. The action of the trial court in discharging a rule for judgment for want of a sufficient affidavit of defense was affirmed. In *Salen v. Bank of State of New York*, 110 App. Div. 636, 97 N. Y. Supp. 361 (N. I. L.), the evidence at the trial showed that one Cassidy was the agent of Salen & Schroeder, in charge of their agency in New York City under a written power of attorney which authorized him to indorse paper, payable to Salen & Schroeder, to the Fifth Nat. Bank of New York for collection or credit; that he also had authority by this power of attorney to draw checks on this bank; that Cassidy indorsed the checks here in question with the firm name, then with his own name, and delivered them to E. H. Norton & Co. to pay an amount due from him personally on a speculative stock account; that E. H. Norton & Co. indorsed the instruments to the defendant bank for collection, which, upon their being paid, paid over the proceeds to Norton & Co.; that defendant had no notice of the character of the transaction by which these checks were transferred to Norton & Co.; that defendant did not know that the indorsement was that of an agent. The trial court directed a verdict for the plaintiffs. On appeal from an order denying a motion to set aside this verdict, the action of the trial court was reversed. It will be noted that this case differs from the preceding, in that here the written power of attorney limited the authority of the agent to indorse checks to indorsing them to a particular bank for deposit or collection. For this reason it seems that the only ground on which this decision can be sustained is that there was evidence that the agent who indorsed for plaintiff was the agent in charge of the plaintiff's business in New York and that from such evidence the jury might have inferred that to a holder subsequent to E. H. Norton & Co. the agent had ostensible authority to indorse the instrument in question to E. H. Norton & Co. See *Blum v. Whipple*, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553 (N. I. L.). Compare *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30. In *Standard Steam S. Co. v. Corn Ex. Bank*, 84 Misc. Rep. 445, 146 N. Y. Supp. 181 (N. I. L.), the court, after referring to *Salen*

no antecedent authority was given.⁴⁵ For there is no sufficient reason why, upon the fact of forgery alone, a person whose name has been forged may not adopt and affirm the forgery or signature as his own act and thereby subject himself to whatever civil liability may follow it.⁴⁶ Estoppel binds the party because his treating the instrument as genuine fixes the right, and he may not overset the right by afterwards disputing it. Thus if the maker of a note or the drawer of a bill issues it to a bona fide holder with forged or fictitious names upon it,⁴⁷ or if an indorser transfer

v. Bank of State of New York, *supra*, said: "In the case cited the agent had general authority to indorse checks for the purpose of depositing them to the credit of his principal, but the exact method of indorsement was not prescribed and restricted as in the case at bar. * * * It is also to be noted that in the Salen Case the agent had general authority to draw checks against deposits which he was authorized to make and to use the proceeds thereof, thus indicating that there was no intent to limit his authority to the performing of a mere carefully restricted physical act."

⁴⁵ *Howard v. Duncan*, 3 *Lans.* (N. Y.) 174; *Union Bank v. Middlebrook*, 33 *Conn.* 95; *Thorn v. Bell*, *Lalor's Supp.* (N. Y.) 430; *Wellington v. Jackson*, 121 *Mass.* 157. See, contra, *Shisler v. Vandike*, 92 *Pa.* 449, 37 *Am. Rep.* 702; *Brook v. Hook*, L. R. 6 *Exch.* 89; *McKenzie v. British Linen Co.*, 44 *Law T.* (N. S.) 431; *Workman v. Wright*, 33 *Ohio St.* 405, 31 *Am. Rep.* 546; *Henry Christian Building & Loan Ass'n v. Walton*, 181 *Pa.* 201, 37 *Atl.* 261, 59 *Am. St. Rep.* 636.

⁴⁶ The student must carry in mind that this doctrine is by no means settled. There is authority against it, which Mr. Daniel has characterized as based upon views of force. *Neg. Inst.* §§ 1351, 1352, et seq.

⁴⁷ *Hortsman v. Henshaw*, 11 *How.* 177, 13 *L. Ed.* 653. In this case the bill had upon it the forged indorsements of the payee, and it was put in circulation by the drawers. "By doing so, they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. * * * The drawers must be equally liable to the acceptor who paid the bill." *Taney*, C. J. *Burgess v. Northern Bank of Kentucky*, 4 *Bush* (Ky.) 600; *Coggill v. American Exch. Bank*, 1 *N. Y.* 113, 49 *Am. Dec.* 310; *Meacher v. Fort*, 3 *Hill* (S. C.) 227, 30 *Am. Dec.* 364. In *Pettyjohn v. National Exchange Bank*, 101 *Va.* 111, 43 *S. E.* 203 (N. I. L.), the action was by the plaintiffs as indorsees against the indorser and makers. The evidence tended to show that the defendant Pettyjohn was a member of the firm of Graham & Holloran; that he was accustomed to indorse notes for the accommodation of the firm; that he withdrew from the firm without notice of any change in the firm to the plain-

an instrument upon which the name of the drawer, maker, acceptor, or of a prior indorser is forged, then each of these parties is bound because of estoppel by virtue of the reasons already discussed under the head of "Warranties."⁴⁸

It often happens, however, that the forgery of the instrument is not detected until the cash called for in it is paid to the ostensible holder. In such case diverse rights arise. The party paying may recover the amount paid from the person paid on the ground of payment under a mistake of fact.⁴⁹ And this is so despite any laches or negligence which may be charged by the person paid to the person paying.⁵⁰ There are two exceptions to this rule. One is

tiff bank, which was accustomed to discount paper indorsed by him; that after his withdrawal one of the partners drew up the note in suit, signed the firm name, made it payable to defendant and indorsed defendant's name thereon; that plaintiff discounted the note for value. The trial court instructed the jury that if they believed from the evidence that the notes sued on were discounted by the bank for Graham & Holloran, that Pettyjohn was a member of the firm, that the firm got the net proceeds of the notes, and that the notes, at the time when they were discounted and delivered to the bank, were indorsed with the name of Pettyjohn, he was liable. Judgment on a verdict for the plaintiff was reversed. The decision, therefore, was that the defendant was not liable to the plaintiff on the notes either as maker or indorser. This seems erroneous. The court says: "The case does not fall within the principle of what seems to be the established doctrine, that the makers of a negotiable instrument, who negotiate it with the forged name of the payee indorsed upon the note, will be held to warrant the genuineness of the signature. (Such instrument has not the inherent infirmity of a note made by a person payable to himself or order, or of a firm payable to one of its members or order, which requires the indorsement of the payee to give it vitality, *but is a complete instrument.*)" The assumption of the court that this note is incomplete until indorsed by the payee seems incorrect, if such an assumption is material, since an assignee of the payee could, it seems, have recovered on the instrument if it had originally been given to the payee for value. See *Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673.

⁴⁸ See *supra*, p. 197 et seq.; *State v. Corning Sav. Bank*, 139 Iowa, 338, 115 N. W. 937.

⁴⁹ *Frank v. Lanier*, 91 N. Y. 112; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Heiser v. Hatch*, 86 N. Y. 614; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305.

⁵⁰ *Frank v. Lanier*, 91 N. Y. 112; *Lawrence v. American Nat. Bank*,

when this payment is made through negligence which results in loss.⁵¹ The other is when a drawee pays a bill upon the forged signature of the drawer to a bona fide holder for value, in which case he is held to a knowledge of his correspondent's signature, and therefore unable to recover from the bona fide holder.⁵² If the payment of paper negotiable only by indorsement is made by the drawee of a draft in good faith under a forged indorsement, it is, as to the true owner of the draft, no payment at all, because the forged indorsement does not pass title to commercial paper, and the true owner may therefore recover the amount of the draft from the drawee,⁵³ as though the drawee had not already made payment of it.⁵⁴ This rule is extended to persons claiming under the forged indorsement who have no title as against the true owners, and to whom for the same reason payment cannot be lawfully made.⁵⁵ Such persons must rely for their protection upon

54 N. Y. 432; *Young v. Lehman, Durr & Co.*, 63 Ala. 523; *Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262; *United States v. National Park Bank* (D. C.) 6 Fed. 852.

⁵¹ *Welch v. Goodwin*, 123 Mass. 77, 25 Am. Rep. 24.

⁵² *Goddard v. Merchants' Bank*, 4 N. Y. 147; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612. In *National Bank of Commerce in St. Louis v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. 429 (N. I. L.), this result was reached, the court considering section 62, N. I. L., as controlling on the ground that a payment of a check by the drawee was equivalent to an acceptance within the meaning of the section. Compare *Title Guarantee & Trust Co. v. Haven*, 196 N. Y. 487, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131 (N. I. L.); *Hein v. Neubert*, 48 Wash. 587, 94 Pac. 104 (N. I. L.).

⁵³ *Citizens' Nat. Bank of Davenport v. Importers' & Traders' Bank of New York*, 119 N. Y. 195, 23 N. E. 540; *Graves v. American Exch. Bank*, 17 N. Y. 205; *Lee v. Coon Rapids Nat. Bank* (Iowa) 144 N. W. 630 (N. I. L.). It is clear that a payment of the check on the forged indorsement of the payee is no defense to an action by the depositor to recover the balance of his account including the amount of such check. *National City Bank of Chicago, Ill., v. Third Nat. Bank of Louisville, Ky.*, 177 Fed. 136, 100 C. C. A. 556 (N. I. L.).

⁵⁴ *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106. But see *Lonier v. State Sav. Bank*, 149 Mich. 483, 112 N. W. 1119 (N. I. L.). See, also, p. 586, (checks), *infra*.

⁵⁵ *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Talbot v.*

the warranties implied in the indorsements of prior parties, already explained.

Same—Blanks—When may be Filled

We have already seen that, although a bill be imperfect for lack of the name of a drawer, if it be accepted and delivered in that form, it operates as authority to the legal holder to insert the name of a drawer, and thus perfect the instrument. This principle is generally applicable where negotiable instruments are issued, but spaces have been left for the insertion of material particulars; for example, the date,⁵⁶ the name of the payee,⁵⁷ or the amount,⁵⁸ or even

Bank of Rochester, 1 Hill (N. Y.) 295; *Dick v. Leverich*, 11 La. 573. Thus the payee of a negotiable instrument, when not estopped, can recover the value of the instrument from one who receives the instrument through a forged indorsement of such payee's name and collects or negotiates the instrument. *Casey v. Pilkington*, 83 App. Div. 91, 82 N. Y. Supp. 525 (N. I. L.); *Blum v. Whipple*, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553 (N. I. L.); *Warren v. Smith*, 35 Utah, 455, 100 Pac. 1068, 136 Am. St. Rep. 1071 (N. I. L.). So where a check payable to a certain payee is delivered to one who fraudulently represents himself to be such payee, the indorsee of the impostor cannot recover on the instrument against the drawer, where there was no negligence on the part of the drawer. *Simpson v. D. & R. G. R. Co.* (Utah) 134 Pac. 883, 46 L. R. A. (N. S.) 1164. This is true because the instrument has no inception, as well as because the indorsement is a forgery.

⁵⁶ *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Page v. Morrel*, 3 Abb. Dec. (N. Y.) 433; *Michigan Ins. Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763; *Shultz v. Payne*, 7 La. Ann. 222; *First State Sav. Bank of Breckenridge v. Webster*, 121 Mich. 149, 79 N. W. 1068. See section 13, N. I. L., quoted in note 66, p. 347, infra.

⁵⁷ *CRUCHLEY v. CLARANCE*, 2 Maule & S. 90, Moore Cases Bills and Notes, 179 (bill payable "to the order of _____.") "The issuing of the bill in blank without the name of the payee was authority to a bona fide holder to insert the name"; *Cruchley v. Mann*, 5 Taunt. 529; *Rich v. Starbuck*, 51 Ind. 87; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Dunham v. Clogg*, 30 Md. 284; *Ives v. Farmers' Bank*, 2 Allen (Mass.) 236.

⁵⁸ *Russel v. Langstaffe*, 2 Doug. 514; *Griggs v. Howe*, 31 Barb. (N. Y.) 100; *Fullerton v. Sturges*, 4 Ohio St. 529; *Frank v. Lilienfeld*, 33 Grat. (Va.) 377; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Market & Fulton Nat. Bank v. Sargent*, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376; *Weidman v. Symes*, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603 (interest clause).

where all material terms remain to be filled in.⁵⁹ Thus in *Russel v. Langstaffe*,⁶⁰ already referred to, where the defendant indorsed for G. copper-plate checks made in the form of promissory notes, but in blank, without any sum, date, or time of payment, and G. filled up the blanks as he chose, and the plaintiff discounted the notes, it was held that the defendant was liable as indorser; Lord Mansfield saying, "The indorsement on a blank note is a letter of credit for an indefinite sum."⁶¹ It may be, however, that

⁵⁹ *Russel v. Langstaffe*, 2 Doug. 514; *Violett v. Patton*, 5 Cranch, 142, 3 L. Ed. 61; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 15.

⁶⁰ 2 Douglas, 514.

⁶¹ Since the filling in of the blanks is merely a ministerial act, it can be done by the agent through another. *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208. N. I. L. § 14, provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." Under this section, as before the act, where the instrument is filled out in accordance with the authority given, any party who completes the instrument, or has notice of the limitations of the authority of the one who completes it, can, of course, recover on it. *Herman's Ex'r v. Gregory*, 131 Ky. 819, 115 S. W. 809 (N. I. L.). Compare *B. E. A.* § 20 (subd. 1); *Glenie v. Smith*, [1908] 1 K. B. 268. Under this section (section 14, N. I. L.), and section 16, N. I. L., it is unnecessary for the holder, in an action on an instrument which he has filled in, to introduce any evidence of his authority to fill in the instrument, other than evidence that the defendant signed the instrument. *Maddon v. Gaston*, 137 App. Div. 294, 121 N. Y. Supp. 951 (N. I. L.). But the plaintiff must introduce some evidence that the instrument was completed by him within a reasonable time. From October 22, 1907, to June 8, 1908, cannot, unless explained, be considered a reasonable time. *Maddon v. Gaston*, supra. See *Dumbrow v. Gelb*, 72 Misc. Rep. 400, 130 N. Y. Supp. 182 (N. I. L.).

the authority of the person to whom the instrument is intrusted is limited to filling the blanks in a particular way, and in such case, if he exceeds his express authority, of course neither he nor any holder with knowledge that the authority has been exceeded can recover. But any one purchasing the instrument as filled in, in reliance upon its terms, would be protected.⁶² Moreover, a bona fide pur-

⁶² Montague v. Perkins, 22 Law J. C. P. 187; Barker v. Sterne, 9 Exch. 684; Bank of Pittsburgh v. Neal, 22 How. 107, 16 L. Ed. 323; First Nat. Bank of Freeport v. Compo-Board Mfg. Co., 61 Minn. 274, 63 N. W. 731. This is true as to the payee of a non-negotiable instrument, who receives it for value and without notice of the completion of the instrument after being signed by the defendant. Stanley v. Davis (Ky.) 107 S. W. 773. So independently of the N. I. L., even though the payee of an instrument be not regarded as a bona fide purchaser for value, he can recover, if he has paid value for the instrument without notice of a breach of authority in filling it out, according to the terms of the instrument as completed. In Lloyd's Bank v. Cooke, [1907] 1 K. B. 794, the defendant was induced to sign as co-maker with C. a blank promissory note stamp to be completed by C. as a note payable to plaintiff for £250. C. fraudulently completed the instrument by making it payable to the plaintiff for £1,000, and issued it for value to the plaintiff, who took in good faith and without notice of the completion of the instrument by C. The Court of Appeal held that the defendant was on common-law principles estopped to deny his liability on the instrument, and that the plaintiff might recover, even assuming that under section 20, subsec. 2, of the Imperial Act, as construed in Herdman v. Wheeler, [1902] 1 K. B. 361, the plaintiff (the payee) was not a holder in due course to whom the instrument had been *negotiated* after completion. In Herdman v. Wheeler, supra, the defendant had signed and delivered a blank promissory note stamp to A., from whom the defendant had agreed to borrow money, and authorized A. to complete the blank by making it payable to himself for £15. A. fraudulently completed it by making it payable to the plaintiff for £30, and delivered it to plaintiff for value, who took in good faith and without notice of the completion of the instrument by A. The court held that the plaintiff could not recover, because he was the payee and not a holder in due course to whom the instrument had been *negotiated* under section 20, subsec. 2, of the Imperial Act. In Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275 (N. I. L.), there was an appeal from a judgment on a directed verdict for the defendants. The facts established beyond dispute were that the defendants signed as makers a note, blank as to date, amount, and payee, and delivered it to one Pothoven, who was to sign as principal maker

chaser is protected, and may enforce the instrument as filled in, even if he had knowledge that the instrument had been delivered in its imperfect state, for he may rely upon

and fill the blank up for \$150 or \$200. Pothoven made the note payable to the plaintiff for \$2,000 and delivered it for value to the plaintiff. There was no understanding as to who should be the payee, as in *Herdman v. Wheeler*. By affirming the judgment the court held that these facts required the direction of a verdict for the defendant, although the plaintiff may have had no notice that the instrument was not complete when signed by the defendant. The reasoning in the two cases last cited is similar. In the former the court refers with approval to the argument of counsel that as between the original parties to it the note "is governed by the ordinary law of contracts other than the law merchant, and in particular that the element of negotiability in no way enters into the contract between the maker and payee," and finds in this some reason for construing the act as it did. So in the latter case the court, by McClain, J., said: "In the ordinary case the payee of the instrument is the person with whom the contract is made, and his rights are not in general dependent upon any peculiarities in the law of negotiable instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation and not as an original party." But as stated above, and as decided by decisions cited by the court in this case, the rule that one who delivers a blank instrument to another to be completed is estopped to deny the filling up of the instrument in accordance with the authority given, as against an innocent payee who has received the instrument for value, applies irrespective of the negotiability of the instrument, since the liability is a common-law liability based upon estoppel. These decisions, therefore, place a payee of a negotiable instrument in a less favorable position than the payee of a non-negotiable instrument. These considerations, among others, suggest that the words "negotiated" in section 14 and "negotiation" in section 52, N. I. L., should receive, if possible, a different construction than that given them by these courts. That such a construction is not only possible, but is the most reasonable, in view of the language and purpose of the whole act, is admirably demonstrated by the opinion of Fletcher-Moulton, L. J., in *Lloyds' Bank v. Cooke*, [1907] 1 K. B. 794, 805-809. In the course of that opinion he said: "It is suggested, however, that these conclusions are negatived by the language of section 29, subsec. 1, which states the conditions under which a person is a 'holder in due course.' I can find nothing in the language of that subsection which throws any doubt on the view that 'holder in due course' would include a payee who has given value in good faith, unless we are to construe the word 'negotiated' as being merely equivalent to 'indorsed.' But, when the definition of 'negotia-

the apparent authority of the person to whom it was delivered to fill in the blanks as he sees fit;⁶⁸ and as against such a holder the fact that the actual authority was exceeded is no defense. Such was the general rule, at least

tion' given by section 31, subsec. 1, is looked at, it appears clear that the Legislature intended to make it apply also to the original operation of transferring the bill to the payee. It lays down that 'a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.' It carefully abstains from prescribing that the transferer must be a 'holder.' All that is necessary to constitute 'negotiation' of the bill is that it should have been transferred from one person to another in such a manner as to constitute the transferee the 'holder of the bill'; i. e.—if we replace 'holder' by its definition in the act—'the payee or indorsee who is in possession of the bill.' A cheque, therefore, payable to a particular person, which is handed by the drawer to that person for value, would be 'negotiated' within the meaning of the act." And in *BOSTON STEEL & IRON CO. v. STEUER*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426 (N. I. L.), Moore Cases Bills and Notes, 179, it was held that where a check is complete and is delivered to a third party to be delivered to the payee in payment of a debt of the drawer to the payee, and the third party procures the payee to accept the check in payment of a debt of his own to the payee, who takes without any actual notice of such breach of authority, such payee is a holder in due course within the meaning of section 52, N. I. L. See *Wolfgang v. Shirley*, 239 Pa. 408, 86 Atl. 1011 (N. I. L.). See, also, page 446, note 41, Chapter VIII, *infra*.

⁶⁸ *Huntington v. Branch Bank at Mobile*, 3 Ala. 186; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Daniel, Neg. Inst.* § 148. And in *Frank v. Lillenfeld*, 33 Grat. (Va.) 377, it was held that the purchaser in good faith of a note in printed form indorsed by the defendant, blank as to date, payee's name, and amount, had the right to fill in the amount paid by him therefor, although in excess of the amount actually authorized by the defendant and to fill in the other blanks. But under sections 14 and 52, N. I. L., it was held in *Guerrant v. Guerrant*, 7 Va. Law Reg. 639 (N. I. L.), that a holder who fills in an instrument, transferred to him while incomplete, according to the statements of the agent of the defendant from whom he received it, cannot recover on the instrument completed by himself unless he has done so in accordance with the authority actually given the agent by the defendant. Accord: *BOSTON STEEL & IRON CO. v. STEUER*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426 (N. I. L.), Moore Cases Bills and Notes, 179. See p. 440, note 40, Chapter VIII, *infra*. Compare *Washington Finance Co. v. Glass*, 74 Wash. 633, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.).

in the United States, although in England it is held that an unfilled blank charges the purchaser with notice, and that he must at his peril ascertain the extent of the authority conferred.⁶⁴ The instrument, when completed, takes effect as of the time of delivery by the maker.⁶⁵

It is essential to its validity that it be delivered as a negotiable instrument, that is, that it be signed and delivered with authority to perfect it as such, for otherwise it can never take effect as such, even in the hands of an innocent purchaser.⁶⁶ Thus, if a man deliver a blank sheet of

⁶⁴ Awde v. Dixon, 6 Exch. 869; Hatch v. Searles, 2 Smale & G. 147; 2 Ames Cas. Bills & N. 868. See Washington Finance Co. v. Glass, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.).

⁶⁵ Barker v. Sterne, 9 Exch. 684 (a bill delivered in Bavaria with blanks afterwards filled in England is a foreign bill); Snaith v. Mingeay, 1 Maule & S. 87. Blanks must be filled within a reasonable time. Temple v. Pullen, 8 Exch. 389; Rand. Com. Paper, § 183.

⁶⁶ BAXENDALE v. BENNETT, 3 Q. B. Div. 525, Moore Cases Bills and Notes, 184 (where blank acceptance was stolen); Ledwich v. McKim, 53 N. Y. 307. Cf. N. I. L. § 34. N. I. L. § 15, provides: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." N. I. L. § 16, includes this provision: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." In Linick v. A. J. Nutting & Co., 140 App. Div. 265, 125 N. Y. Supp. 93 (N. I. L.), the action was by the drawer of a check against an indorsee for money had and received to the plaintiff's use. The trial court dismissed the complaint. The evidence showed that the check was drawn in blank by the plaintiff, was stolen from him by persons who filled in the name of a fictitious payee, obtained certification from the bank, and indorsed for value to the defendant, who obtained payment from the bank, and that plaintiff had paid the bank the amount of the check. The judgment for the defendant was reversed by three justices against two upon the ground that sections 15 and 16, N. I. L., construed together, codified the decision in BAXENDALE v. BENNETT, supra. In Trust Co. of America v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367 (N. I. L.), the action was by a bank to recover for an overdraft. The evidence showed that the defendant, on leaving the city, gave several checks signed in blank to his bookkeeper for use in the business during his absence. The bookkeeper locked these checks in a drawer. A porter in the defendant's employ, who had no authority to fill out any checks, knew where the key was hidden, opened the

paper, with his signature thereon, to another, with authority to write over it a note, and the person to whom it is delivered does so, the signer is liable to an innocent pur-

drawer, and filled in one of the checks for \$200. The plaintiff bank paid this check. The trial court gave judgment for the plaintiff. This judgment was affirmed without specific reference to section 14 or section 15, N. I. L. See statement by the court quoted p. 335, note 35, *supra*. In *Linick v. A. J. Nutting & Co.*, *supra*, the court said (140 App. Div. 271, 125 N. Y. Supp. 98): "Defendant contends that as against the plaintiff the bank was justified in paying out the plaintiff's money on the check, and cites in support of his contention *Trust Co. of America v. Conklin*, *supra*. If so, it was not because the check was a valid check in the hands of a third person, but because of the peculiar contract relation between the bank and its depositor. We are not called upon to decide this, since it seems to be conceded that, if the check was not a valid obligation in the hands of the defendant, this action will lie as for money had and received." The statement in the text that the instrument must be signed and delivered *with authority to perfect it as such* is misleading. There is a class of instruments in which blanks have been left so as to suggest incompleteness, but which, without the filling of such blanks, have all the *essentials* of mercantile specialties. In this class of cases it seems clear that, if the blank is filled in without actual authority, a bona fide holder for value can recover, although it was never intended by the party sought to be held liable that this blank should ever be filled, or, it seems, even if he gave over the instrument merely as a sample of his handwriting. In *Johnston v. Hoover*, 139 Iowa, 143, 117 N. W. 277 (N. I. L.), the undisputed evidence of the plaintiff was that he was an innocent purchaser for value of the instrument, without knowledge that it was blank in any respect when signed by the defendant. The testimony of the defendant was that when the instrument left his hands after the word "at" there was a blank; *that he never authorized this blank to be filled*. On this evidence the trial court directed a verdict for the defendant maker. Judgment on this directed verdict was reversed. Accord: *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643, *semble*. It is essential to an instrument of this class that an omission be suggested by the face of the instrument. Thus, where a note contains several blanks, including one for the date, it is a material alteration to add "with interest," where no blank suggesting the insertion of a promise to pay interest has been left on the face of the instrument by the defendant. *Usefot v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290 (N. I. L.). See *First Nat. Bank v. Barnum* (D. C.) 160 Fed. 245 (N. I. L.); *First Nat. Bank of City of Brooklyn v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.). N. I. L. § 13, provides: "Where an instrument expressed to be payable at a fixed period after

chaser of the note, although its amount exceed the sum authorized. On the other hand, if a man gives to another a blank sheet, with his signature thereon, but without au-

date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date." Where, however, the payee of an undated note inserts a date other than the date of issue, this still constitutes, *as against such payee*, a material alteration discharging prior non-consenting parties. *Bank of Houston v. Day*, 145 Mo. App. 410, 122 S. W. 756 (N. I. L.). An instrument of the class just described is by the words of section 14, N. I. L., distinguished from a signed blank paper, which, until filled in, is not, on its face, a mercantile specialty. It has been held under sections 31 and 32 of the Canadian B. E. A. (the provisions of which sections are in this respect substantially the same as those of section 14, N. I. L.) that one who signs a blank form for a promissory note and delivers it upon condition that upon the happening of a certain contingency it may then, but not otherwise, be converted into a note is not liable on the instrument to a holder in due course, in case it is fraudulently completed and negotiated before the happening of the contingency. *Hubbert v. Home Bank*, 20 Ont. Law Rep. 651; *Ray v. Willson*, 19 Ont. Weekly Rep. 470. In *Hubbert v. Home Bank* the plaintiff signed, indorsed in blank, and delivered to S. an instrument in the following form: "\$440.50. Oct. 1, 1908. December 1st. After date I promise to pay to the order of myself _____ dollars at _____. Value received." The instrument was delivered to S., who was an insurance agent, upon condition that nothing should be done with it until and unless the plaintiff passed the medical examination. The plaintiff never presented himself for examination, but S. fraudulently filled in the blank in the body of the note with the amount, \$440.50, and the blank for the place of payment with the name of the plaintiff's bank, and negotiated the instrument to the United Empire Bank, a holder in due course. Upon presentment to the plaintiff's bank the instrument was paid. The court assumed that the note was incomplete when delivered by the plaintiff to S., and held, adopting the reasoning in *Smith v. Prosser*, [1907] 2 K. B. 735, that the plaintiff could recover the amount paid by the defendant upon the note. The judgment was affirmed by D. C., and the Court of Appeal refused a motion for leave to appeal. Britton, J., said: "The paper in the hands of Stirton must be treated as if 'a simple signature on a blank piece of paper' had been handed by the plaintiff to Stirton. Even if the paper had upon it some writing, so that it appeared as I have before mentioned, it would be

thority to write over it a negotiable instrument—for example, for the purpose of furnishing means of identifying

harmless. No bank would negotiate such paper, and Stirton had no more right, under section 31, to fill in the amount in writing and the place of payment than to wholly fill up a blank piece of paper with only a signature upon it. It had to be filled up before it could be used, and it was filled up by Stirton. It was not delivered to Stirton in order that it might be converted into a note or negotiated as a note. Sections 31 and 32 of the Canada Bills of Exchange Act are practically the same as section 20 of the English Act: [The sections are here copied.] * * * In *Smith v. Prosser*, [1907] 2 K. B. 735, the language of these two sections has been dealt with and the sections have been construed. In that case the defendant signed his name on two blank lithographed forms of promissory notes, and handed these to one of his two agents, with instructions that they were to remain in the custody of his attorney until the defendant should by telegram or letter give instructions for their issue as notes and as to the amount for which they should be filled up. After the defendant left, the person to whom defendant had handed the documents, without waiting for instructions from the defendant, and in fraud of the defendant, filled in the blanks and sold them to the plaintiff, 'who took them honestly and in good faith and without notice of the fraud, and gave full value for them.' It was held 'that as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff, and that the action was not maintainable.' As stated before, I am considering this as if 'a simple signature on a blank piece of paper' handed by the plaintiff to Stirton. It was, in fact, a form of a promissory note. The plaintiff had written nothing on it, but his signature on the face and again on the back. He will not say that the figures '\$440.50' and 'Oct. 1st' and 'December 1st,' and the word 'myself,' may not have been on it when he signed, but that is as far as he will go. It was not given to Stirton that it might 'be converted into a note,' or that it might be used or negotiated as a note. The plaintiff signed the paper, intending it, not as a note, but as a promise to pay premium for life insurance in case he submitted himself for, and passed, the necessary medical examination. He did not pass such examination; he did not even see the medical man. Stirton, who held the plaintiff's signature, was immediately notified by the plaintiff; but he, in fraud of the plaintiff, completed the form as a note, and negotiated it with the United Empire Bank. In my opinion, the case cited governs the present case, and, upsetting as that case may be of the opinions of bankers here, as to the true meaning of the sections of the Bank Act referred to, I must follow the authority. I quote from the judgments in that case: *Vaughan Williams, L. J.*, at page 744: 'In my judgment it

the signer's signature—and the other writes a note over the signature, and negotiates it, the signer is not liable, even

is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person, to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.' It seems to me clear that what the plaintiff did was not to give to Stirton a promissory note or a paper that could be converted into a promissory note, or that Stirton would have any right or authority to deal with in any way until he should get authority after the plaintiff's application for insurance had been accepted." In *Smith v. Prosser*, [1907] 2 K. B. 735, the defendant signed and delivered an unstamped promissory note blank to T., with instructions to retain it until defendant notified T. and one W. to complete and issue the paper as a note. T. fraudulently completed the note, designating the plaintiff as payee, and issued it to the plaintiff, who paid value and acted in good faith, though he knew that T. had completed the instrument and that T. held it for the use of the defendant. The Court of Appeal held that the plaintiff could not recover, resting its decision, not on the fact of the plaintiff's notice of the completion of the instrument by T., but on the ground indicated in *Hubbert v. Home Bank*. In *Ray v. Wilson*, [1911] 19 Ont. Weekly Rep. 470, 476, the defendant signed and delivered a promissory note blank to T., to be held by him until instructed by the defendant to complete and negotiate it. T., without instructions, completed the instrument, making it payable to himself for \$1,000, and pledged it to the plaintiff, a holder in due course, as collateral security for a personal debt. In holding that the plaintiff could not recover, the Court of Appeal, although noticing the distinction between the facts before it and those in *Smith v. Prosser*, followed *Hubbert v. Home Bank*, which was referred to as a case "where the facts were substantially the same as in the present case." In adopting the reasoning in *Smith v. Prosser*, Mr. Justice Maclaren said "that Thompson was given no authority to fill up or issue the note unless he, the defendant, on receipt of the bills for the repairs, should not have the money to pay them and should so inform Thompson, which brings the case fully, so far as the facts and terms of delivery are concerned, precisely within the case of *Smith v. Prosser*; while in that case it was said that the act did not apply, on account of the blank promissory note form not being stamped, it was held by the English Court of Appeal that the act had not in this respect altered the law, and it was followed in our own courts in *Hubbert v. Home Bank*, 15 Ont. Weekly Rep. 277, 533, 20 Ont. Law Rep. 651, where the facts were substantially the same as in the present case. By section 39 of the act every contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto. In *Smith v. Prosser* the court held that there had been no delivery to give effect to the

to a bona fide purchaser for value.⁶⁷ As has been pointed out, an instrument with blanks purposely left to be filled is to be distinguished from one in which spaces have been carelessly left, so that it is thereby made possible to raise the amount, or make other fraudulent additions.⁶⁸ In the latter case, if advantage is taken of the maker's negligence, the addition is an alteration or forgery, and operates as a real defense, unless the person who issued the instrument is estopped by his negligence—a question upon which the authorities disagree.⁶⁹

instrument, but that it was delivered to Telfer as a mere custodian until he should receive further instructions, and that it was not delivered in order that it might be converted into a bill, so that section 31 would not apply. In the reasons of appeal and before us it was claimed that Smith v. Prosser was not in point because it was subject to what is our section 32, and was not enforceable because not filled up in accordance with the authority, and because Smith was not a holder in due course, as the note was not complete and regular when first shown to him, and he had notice that it was being completed pursuant to a limited authority. This is quite true, but the action was not dismissed on that account, but because it had never been delivered by Prosser to be completed as a bill, and consequently could not become a bill binding upon him. It is argued that here the plaintiff can recover as a holder in due course under the proviso of section 32, which provides that, 'if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.' It will be observed that this applies only 'to any such instrument,' that is, to such an instrument as is mentioned in section 31, and one which has been delivered by the signer in order that it may be 'converted into a bill,' and does not apply to an instrument like this, delivered merely to be held to a bailee or custodian until further instructions are received from the signer. It is not pretended that such instructions were ever given, so that the instrument never became a note for want of a proper delivery." Compare Trust Co. of America v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367 (N. I. L.).

⁶⁷ Caulkins v. Whisler, 29 Iowa, 495, 4 Am. Rep. 236; Nance v. Lary, 5 Ala. 370. Compare Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 114, 132 N. W. 911.

⁶⁸ Ante, p. 331, note 35.

⁶⁹ Ante, p. 331.

108. Common personal defenses are:

- (a) Fraud.
- (b) Duress.
- (c) Want or failure of consideration.
- (d) Illegality, unless the contract is declared void by statute.
- (e) Payment, or renunciation or release, before maturity.
- (f) Discharge of party secondarily liable by release of prior party.

The student has already seen the reason of the classification of defenses into real and personal. Real defenses avail against a bona fide holder; personal defenses do not. Real defenses avail because the right sought to be enforced never existed or has ceased to exist, and therefore the bona fide holder can acquire none.⁷⁰ Personal defenses do not avail because they do not invalidate the instrument, and a bona fide purchaser, having acquired the legal title to it, without notice, may enforce it irrespective of the existence of circumstances which would have made enforcement by prior holders inequitable. For example, bills or notes whose execution or indorsement was procured by fraud are not enforceable between the original parties, because, but for the fraud, the defrauded party would not have executed or indorsed the instrument. If they are defective in point of consideration there is nothing to sustain the contract, and it must fall to the ground. If the consideration of the instrument or that of its indorsement is illegal, then to allow the enforcement of the contract in violation of law would be a legal absurdity, and so in these and many other cases relief, as between immediate parties, is allowed by courts to the person wronged. But throughout them the student will notice that there is running one common char-

⁷⁰ The above statement is subject to qualification, for in certain cases the defendant is estopped as against a bona fide purchaser from denying the execution of the instrument, although he in fact never executed it. *Supra*, p. 331.

acteristic. They all are based upon some personal act or omission of a nature such that to enforce the instrument as between parties would be to enable the prosecuting party to profit by his own fraud, or take advantage of his own wrong, or found a claim upon his own iniquity. Courts will not lend their active aid to one guilty of such unscientific conduct, or to one who is in equal wrong with the defendant touching the transaction as to which relief is sought. By allowing the defense this will leave the parties where they find them, without interfering in behalf of either. The maxim is that "he who comes into equity must come with clean hands," and the courts, as between immediate parties, will not enforce the contract in favor of one who is not justly and legally entitled to its enforcement. But this principle does not apply to the bona fide holder who is not a party to the transaction. He has committed no wrong. He knows of no wrong. He has paid value for the instrument, and purchased what he supposed was a good legal title to enforce all the rights it contained or evidenced. Therefore, so far as the act of any third party is concerned, both he and the party complaining of the wrong are equally innocent. But the bona fide holder has the superior equity, in that he has the legal title to the instrument, and for the further reason that of two innocent parties—the party wronged and the bona fide holder—he whose act or omission has caused the loss must bear it. Therefore, as between these two innocent parties, a defense caused by the act, omission, conduct, or agreement of the wronged person with reference to the instrument is not allowed to the wronged person against the bona fide holder. And thus, in dealing with defenses to actions upon bills and notes in the hands of bona fide holders, the first question for the student to ask himself is whether the defense is real and valid, or personal and not available.

109. **FRAUD**—Where a person is induced by fraud to execute a bill or note, he is liable thereon as against a bona fide purchaser for value.
110. Where a person is induced by fraud to sign a bill or note under the belief that he is signing a different instrument, his signature is null and void, and he is not liable thereon, even as against a bona fide purchaser for value, provided that in so signing he acted without negligence.⁷¹

It is very difficult to furnish the student with any clear and certain tests to determine in all cases the meaning of the defense of fraud in the inception, making, or transfer of a negotiable instrument. The principal reason why fraud is ordinarily a personal defense is that it renders the contract voidable at the option of the defrauded party, because, but for the fraud, he would not have entered into it. But the acts, omissions, concealments, or conduct which go to make up the legal conception of fraud are in their nature so multiform that to cover their many phases by a set of concise definitions is well-nigh impossible. Mr. Pomeroy says of fraud generally that it includes "all willful or intentional acts, omissions, or concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, by which an undue or unconscientious advantage over another is obtained."⁷² Sir William Anson declares the test in determining fraud to be whether under the circumstances an action for deceit against the party committing the fraud will lie, and speaks of a fraud "as a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."⁷³ And the text writers upon Contracts

⁷¹ Chalm. Bills & N. art. 52. Cf. article 94.

⁷² Pom. Eq. Jur. § 873.

⁷³ Anson, Cont. pp. 153, 154.

generally,⁷⁴ treating it as a matter of misrepresentation, which it usually is, analyze fraud along the lines of Sir William Anson's definition, and, resolving it into the constituent elements, say that there must be (1) false representation of a past or existing material fact, (2) such that the other party has a right to rely upon it, (3) made with either knowledge of its falsity, or with reckless disregard whether it be true or false, (4) intended to be brought to the knowledge of the other party, (5) and that it must deceive the other party, and (6) result in injury to him.⁷⁵ Suffice it to say, with regard to these general statements, that they often furnish the test in determining fraud in the case of the giving of negotiable instruments as well as of their indorsements. Their meaning and practical application, however, are so fully discussed in elementary works on Contracts that it is unwise to give further space to the question here.⁷⁶

With negotiable instruments the question that principally concerns us is the position of the bona fide holder. Fraud is always a defense against immediate parties or subsequent holders with notice of the fraud,⁷⁷ but it is not, in general,

⁷⁴ Chit. Cont. p. 750 et seq.; Pol. Cont. p. 512 et seq.; 2 Pars. Cont. p. 769 et seq.; Lawson, Cont. § 226 et seq.; Clark, Cont. p. 324 et seq.

⁷⁵ Clark, Cont. p. 324.

⁷⁶ Civ. Code N. Y. 1879, §§ 757, 758. The proposed New York Civil Code classified and defined fraud thus: "Actual fraud consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract. Its elements are (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; (5) any other act fitted to deceive. Constructive fraud consists (1) in any breach of duty which, without an actually fraudulent intent, gives an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

⁷⁷ N. I. L. § 55; Murchison v. Nies, 87 Kan. 77, 123 Pac. 750 (N.

a defense against purchasers for value without notice.⁷⁸ This is because a contract once entered into, although induced by fraud, is voidable, and not void. The defrauded party has the right to disaffirm, but his right to disaffirm is conditional upon his restitution of the other party to the condition in which he would have been if the contract had not been made; and, if the contract be one of sale, the right of rescission is not available against one who has, for value, acquired an interest in the thing sold without notice. This rule is an application of the principle that, when one of two innocent parties must suffer for the fraud of another, the loss shall fall upon the one who enabled the third party to commit the fraud. Hence a bill or note once executed is none the less valid because obtained by fraud. The defrauding party to whom it is delivered acquires a title to the instrument, which, although defeasible while in his hands, is legal, and which he may transfer, and which, when transferred to a bona fide purchaser, becomes thereby indefeasible. It may, therefore, be laid down broadly that, when a man executes a negotiable instrument understandingly, it is never a defense, as against a bona fide purchaser, that the maker's consent to the execution was obtained by fraudulent representation, or was otherwise induced by fraud.⁷⁹

I. L.); *Hill v. Dillon*, 151 Mo. App. 86, 131 S. W. 728 (N. I. L.). But in an action by the indorsee of a negotiable note against the maker, the fact that the payee was induced by fraud to transfer the note to the plaintiff is not a defense. *Gamel v. Hynds*, 34 Okl. 388, 125 Pac. 1115. See, however, N. I. L. §§ 119, 88, 55. The burden of proof as to a personal defense is on the one setting up such defense. *Cowboy State Bank v. Guinn* (Tex. Civ. App.) 160 S. W. 1103.

⁷⁸ Accord: N. I. L. §§ 55, 57. See p. 359, note 83, infra; *Norris v. Merchants' Nat. Bank*, 2 Ala. App. 434, 57 South. 71; *Bothwell v. Corum*, 135 Ky. 766, 123 S. W. 291 (N. I. L.); *Bank of Sampson v. Hatcher*, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989 (N. I. L.); *First Nat. Bank of Durand v. Shaw*, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342 (N. I. L.); *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102 (N. I. L.); *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192 (N. I. L.).

⁷⁹ *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; *MILLER v. FINLEY*, 26 Mich. 249, 12 Am. Rep. 306, *Moore Cases Bills and Notes*, 189; *Justh v. National Bank of the Common-*

A different question is presented, however, when the fraud or misrepresentation relates to the character of the instrument, and the maker is thereby induced to sign and deliver it in the belief that it is an instrument of a different character. In such case the minds of the parties never meet, for the defrauded party thinks he is signing one instrument, and the defrauding party is aware that the signer is signing a different instrument. The case is, in effect, one of mistake, induced by fraud.⁸⁰ Under these circumstances the signer is not a party to the instrument actually delivered, and cannot be held liable upon it, even by a bona fide purchaser, unless he is estopped from maintaining the defense of fraud by reason of his negligence.⁸¹ This defense is frequently successfully interposed by persons who,

wealth, 58 N. Y. 478; First Nat. Bank of Cortland v. Green, 43 N. Y. 298; Farmers' & Citizens' Nat. Bank v. Noxon, 45 N. Y. 762; Ocean Nat. Bank of New York v. Carll, 55 N. Y. 440; GROCERS' BANK OF NEW YORK v. PENFIELD, 69 N. Y. 502, 25 Am. Rep. 231, Moore Cases Bills and Notes, 138; Nickerson v. Ruger, 76 N. Y. 279; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; Smith v. Livingston, 111 Mass. 342; Sullivan v. Langley, 120 Mass. 437; Hayes v. Caulfield, 5 Q. B. 81; Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Gridley v. Bane, 57 Ill. 529; Ormsbee v. Howe, 54 Vt. 182, 41 Am. Rep. 841; Clark v. Tanner, 100 Ky. 275, 38 S. W. 11; David v. Merchants' Nat. Bank, 103 Ky. 586, 45 S. W. 878; Rand. Com. Paper, § 1891.

⁸⁰ A mere mistake as to one of the terms of the instrument—as inserting a wrong date—is not a defense against a bona fide purchaser. Huston v. Young, 33 Me. 85. So a mistake as to any essential matter of inducement is only a personal defense. Grant v. Isett, 81 Kan. 246, 105 Pac. 1021; First Nat. Bank of Durand v. Shaw, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342 (N. I. L.); Short v. Thomas (Mo. App.) 163 S. W. 252 (N. I. L.); Security Sav. & T. Co. v. King (Or.) 138 Pac. 465 (N. I. L.).

⁸¹ Foster v. Mackinnon, L. R. 4 C. P. 704 (leading case); Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; National Exch. Bank of City of Auburn v. Veneman, 43 Hun (N. Y.) 241. Compare Green v. Gunstan, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212 (N. I. L.); Gittings v. Duncan (Iowa) 145 N. W. 872 (N. I. L.). Misrepresentation as to nature and effect, where maker knew he was signing a note, held no defense against bona fide holder under statute substantially enacting doctrine of Foster v. Mackinnon. Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486; First Nat. Bank of Watonga v. Wade, 27 Okl. 102, 111 Pac. 205, 35 L. R. A. (N. S.) 775.

from infirmity, blindness, or illiteracy, are unable to read what they sign, and who are thereby imposed upon.⁸² It is evident, however, that cases in which the qualification of this rule does not apply, namely, in which the party imposed upon has not been guilty of negligence, are rare; and the majority of the cases properly lay down the rule that the failure of the maker or acceptor to use all means to ascertain the nature and character of the instrument he signs is negligence which makes him liable to the bona fide holder.⁸³

⁸² Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548 (defendant unable to read or write English); Whitney v. Snyder, 2 Lans. (N. Y.) 477; Fenton v. Robinson; 4 Hun (N. Y.) 252; Puffer v. Smith, 57 Ill. 527; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. Rep. 184; Lindley v. Hofman, 53 N. E. 471, 22 Ind. App. 237.

⁸³ Chapman v. Rose, 56 N. Y. 137, 15 Am. Rep. 401; National Exch. Bank of City of Auburn v. Veneman, 43 Hun (N. Y.) 241; Douglass v. Matting, 29 Iowa, 498, 4 Am. Rep. 238; Shirts v. Overjohn, 60 Mo. 315; Ort v. Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; Mackey v. Peterson, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211; Park v. Funderburk, 87 S. C. 76, 68 S. E. 963. But see, contra, Hubbard v. Rankin, 71 Ill. 129, governed by statute; Gibbs v. Linabury, 22 Mich. 492, 7 Am. Rep. 675. It seems that the rule where the maker is induced to sign by fraud under the belief that he is signing an instrument of a different character would be the same under the Negotiable Instruments Law. Section 55 provides that "the title of a person who negotiates an instrument is defective * * * when he obtained the instrument, or any signature thereto, by fraud," etc.; and section 57 provides that a "holder in due course holds the instrument free from any defect of title of prior parties," etc.; but these sections should be read in the light of the existing law. Such has been the ruling in England under the somewhat different language of the Bills of Exchange Act, § 29, subd. 2, which reads: "The title of a person who negotiates a bill is defective * * * when he obtained the bill, or the acceptance thereof, by fraud," etc. Lewis v. Clay, 42 Sol. J. 151. This, however, was not the case of a "holder in due course," but of a payee who took notes for value, and in good faith. Defendant's signature was obtained by an elaborate fraud, practiced by a friend, in the belief that he was signing private family documents of the other as a witness. The jury found that defendant was not negligent, and that he signed in misplaced confidence in the statements of his friend. The court held that he was not estopped from setting up the facts, and that they afforded a defense. Lord Russell said: "There is nothing in the act which prevents the defendant from setting up the defense that he never made the promissory notes in question—which

In the class of cases last considered the liability of the defendant upon an instrument which he never executed rests upon the principle of estoppel, whereby he is precluded, by reason of his negligence, from denying that the instrument which he in fact signed and delivered was really executed by him. The principle of estoppel is also invoked in favor of bona fide purchasers in cases where the defendant signed the instrument upon which he is sought to be charged, but never delivered it. This principle is generally applied (1) where delivery is wrongfully made by a person to whom the instrument is intrusted by the maker; and (2) in many jurisdictions, where there is in fact no delivery, but the completed instrument is wrongfully taken from the possession of the maker.

In case of delivery through fraud or violation of the trust reposed in, or of the instructions given to, an agent or to a third party who holds the instrument, the cases are of two classes. The person holding the bill or note may be either an agent, or merely its custodian. In case of agency, the principal has parted with the paper with the intention of disposing of it, though in its disposition the agent has committed a fraud, breach of trust, or acted in violation of his principal's instructions. In case of paper held by a custodian, there is no intention of the person sought to be charged to part with the paper until some event or contingency has happened, in which case the holder is empowered and becomes an agent to deliver. In both of these classes the balance of equities is, on the one hand, between the undoubted legal proposition that no man can be di-

is the real defense here. * * * It was admitted that the case of Foster v. Mackinnon, L. R. 4 C. P. 704, is in point, and is an authority binding on me if the Bills of Exchange Act of 1882 has not altered the law as there declared. I find that the law has not been so altered. * * * They [the authorities cited] are all cases where the bills or notes had been negotiated to persons now called 'holders in due course.' It follows if such a holder cannot, in a case like the present, recover, a fortiori, that the plaintiff—who, as named payee, is one of the immediate parties—cannot recover." See Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212 (N. I. L.). Compare Gibson v. Feeney, 66 Wash. 531, 120 Pac. 97 (N. I. L.).

vested of his own property without his own consent, and that consequently even the honest purchaser of personal property cannot hold against the true proprietor, and, on the other hand, the fact that the party sought to be charged and the bona fide purchaser are equally innocent of wrong, and one of them must suffer a loss. The adjustment of these conflicting equities turns upon the point that the party sought to be charged has by his voluntary act conferred upon the agent or custodian through whom the bona fide purchaser derives his title either the apparent right of property, as owner, or of disposal, as agent, or else has clothed him with such evidence of the right to transfer as to imply authority of disposal. And the principle applies that where one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit such fraud or wrong must bear the loss.⁸⁴

In the second class of cases just mentioned—that is, where the completed instrument is stolen or otherwise wrongfully taken from the possession of the maker, and afterwards indorsed by the payee, or if the paper is payable to bearer negotiated by delivery—it is forcibly urged, on the

⁸⁴ Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Vallett v. Parker, 6 Wend. (N. Y.) 615; Smith v. Moberly, 10 B. Mon. (Ky.) 269, 52 Am. Dec. 543; Passumpsic Bank v. Goss, 31 Vt. 315; Bonner v. Nelson, 57 Ga. 433; Fearing v. Clark, 16 Gray (Mass.) 74, 77 Am. Dec. 394 (note delivered in escrow); Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486; Cluett v. Couture, 140 App. Div. 830, 125 N. Y. Supp. 813 (N. I. L.); Demelman v. Brazier, 198 Mass. 458, 84 N. E. 856 (N. I. L.); Laing v. Hudgens, 82 Misc. Rep. 388, 143 N. Y. Supp. 763 (N. I. L.). So where the instrument is signed and delivered to one of the payees with the understanding that it is not to take effect before other persons sign. Norris v. Merchants' Nat. Bank, 2 Ala. App. 434, 57 South. 71. Between the original parties, however, the failure to perform such a condition precedent to delivery according to such a collateral agreement is a good defense. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192 (N. I. L.); Young v. Hayes, 212 Mass. 525, 99 N. E. 327 (N. I. L.); Bombojaski v. First Nat. Bank (Ind. App.) 101 N. E. 837. See Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841 (N. I. L.). Compare, Oil Well Supply Co. v. MacMurphy, 119 Minn. 500, 138 N. W. 784. See § 37, supra.

one hand, that the instrument never had an inception, and hence cannot be the foundation of any liability; and for this reason it has been held by some cases that the want of delivery is a defense even against a bona fide purchaser.⁸⁵ On the other hand, it is urged that the bona fide purchaser under such circumstances is entitled to the same protection that he receives when he has purchased paper payable to bearer, which, having been duly issued, was afterwards stolen from the legal holder, and negotiated; and it is accordingly held by other cases that against a bona fide holder it is no defense that the paper was stolen from the maker.⁸⁶ It is impossible to support these decisions upon any theory of negligence attributable to the maker, for in many cases there was no negligence, or upon any theory of contract; but they are rather to be supported as an application or extension of the policy of the law which seeks to secure the free and unrestrained circulation of commercial paper. As we have seen,⁸⁷ where the instrument has been signed, but not filled out, this exception does not apply; although it is difficult to distinguish this case from the last. Of course, if the maker actually delivers the paper, leaving blanks, another principle applies, for the bona fide purchaser is

⁸⁵ Hall v. Wilson, 16 Barb. (N. Y.) 548; Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469.

⁸⁶ Gould v. Segee, 5 Duer (N. Y.) 260; Shipley v. Carroll, 45 Ill. 285; Clarke v. Johnson, 54 Ill. 296; Kinyon v. Wohlford, 17 Minn. 239 (Gli. 215), 10 Am. Rep. 165; Worcester County Bank v. Dorchester & M. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120 (bank notes stolen); Cooke v. United States, 91 U. S. 389, 23 L. Ed. 237 (United States treasury notes surreptitiously put into circulation). See Daniel, Neg. Inst. §§ 837-840. N. I. L. § 16, seems in accord with this view. In Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959 (N. I. L.), it was held that an innocent transferee of notes payable to the defendant, by him indorsed in blank and then stolen from him could recover against the defendant as indorser. Accord: Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N. Y. Supp. 922 (N. I. L.). See Poess v. Twelfth Ward Bank of City of New York, 43 Misc. Rep. 45, 86 N. Y. Supp. 875 (N. I. L.).

⁸⁷ Ante, p. 347.

justified in relying upon the apparent agency of the person to whom the paper is intrusted to fill it out as he sees fit.⁸⁸

Duress

Duress, as applied to bills and notes, consists in actual or threatened violence or imprisonment. The subject of it must be the contracting party himself, or his wife, parent, or child. It must be inflicted or threatened by the other party, or else by one acting with his knowledge and for his advantage.⁸⁹

The doctrine of some of the authorities is that a bona fide purchaser for value does not acquire a good title to paper which he has bought from one who has procured it by duress. They distinguish duress from fraud in that in case of fraud there is ordinarily a voluntary execution of the instrument, and an uncontrolled volition to pass the title. But in case of duress, where there exists coercion, threats, or compulsion, there is no such volition. There is no intention nor purpose but to yield to moral pressure for relief from it, and therefore it is maintained that a case is thus presented more analogous to a parting with property by robbery, and that no title can be made through a possession thus acquired.⁹⁰ This position is certainly logical. But in criticism of the authorities cited it may be said that,

⁸⁸ Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573; Mitchell v. Culver, 7 Cow. (N. Y.) 336; Page v. Morrell, *42 N. Y. 117; Garrant v. Haddan, 67 Pa. 82, 5 Am. Rep. 412; Young v. Grote, 4 Bing. 253; Kitchen v. Place, 41 Barb. (N. Y.) 465; Douglass v. Matting, 29 Iowa, 498, 4 Am. Rep. 238; McDonald v. Muscatine Nat. Bank, 27 Iowa, 319; Harris v. Berger, 15 N. Y. St. Rep. 389; Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, at page 136, 21 N. E. 168; Davis Sewing Mach. Co. v. Best, 105 N. Y. 59, 11 N. E. 140. But see *ante*, p. 346, note 63.

⁸⁹ Anson, *Cont.* p. 164.

⁹⁰ Barry v. Equitable Life Assur. Soc. of United States, 59 N. Y. 587; Loomis v. Ruck, 56 N. Y. 462; Huguenim v. Baseley, 14 Ves. 273, 3 Lead. Cas. Eq. 94, 463; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Gardner v. Gardner, 34 N. Y. 155; Voorhees v. Voorhees, 39 N. Y. 463, 100 Am. Dec. 458; Tyler v. Gardiner, 35 N. Y. 559; Kinne v. Johnson, 60 Barb. (N. Y.) 69; Ferris v. Brush, 1 Edw. Ch. (N. Y.) 572; Fry v. Fry, 7 Paige (N. Y.) 461. See Hartsell v. Roberts (Ala.) 64 South. 90.

so far as they relate to negotiable paper, they do not bear out what is claimed for them by the text writers.⁹¹ Loomis v. Ruck and Barry v. Equitable Life Assurance Society are illustrations. In Loomis v. Ruck the signature of a married woman was given under duress to a note for the sole benefit of her husband, to the plaintiff, who, at the time of the duress, was present. It is true that the statement of the New York Court of Appeals was that a bona fide holder cannot enforce a note against the maker which was given by him under duress, but this statement is, in fact, obiter dictum, because the plaintiff in the case was not a bona fide holder. Neither does the case of Barry v. Equitable Life Assurance Society affect the position, because that relates to the assignment of a life insurance policy, which is a mere chose in action, to which the doctrines of negotiability do not attach. On the other hand, the rule generally laid down in the text-books and supported by a majority of the decisions is that negotiable instruments executed under duress are voidable, and not void, and hence that the defense is merely personal, and not available against an innocent purchaser.⁹² Clearly, if the cases which hold that a bill or note stolen from the maker is good in the hands of an innocent purchaser are correct, an instrument executed under duress should stand upon the same footing. Under the Negotiable Instruments Law,⁹³ as well as the English Bills of Exchange Act,⁹⁴ duress is a personal defense.

⁹¹ Daniel, Neg. Inst. §§ 857, 858; Tied. Com. Paper, § 287.

⁹² Hogan v. Moore, 48 Ga. 156; Ormes v. Beadel, 2 De Gex, F. & J. 333. In Duncan v. Scott, 1 Camp. 100, it was held that, where the defendant was not a free agent when he drew the bill, it was the duty of the plaintiff to produce evidence of consideration. In the case of CLARK v. PEASE, 41 N. H. 414, Moore Cases Bills and Notes, 152, it was held that, where duress is shown in the making or in the circulation of the note, there is imposed upon the plaintiff the burden of showing that he is a bona fide holder for value.

⁹³ Section 55.

⁹⁴ Section 29, subd. 2.

111. CONSIDERATION—Any consideration which will support a simple contract is sufficient to support a negotiable bill or note, or the transfer or indorsement thereof.⁹⁵

In case of negotiable instruments consideration is presumed, but this presumption may be rebutted.

Text writers in their definitions of "consideration" unite in quoting that given by the Exchequer Chamber:⁹⁶ "A valuable consideration in the sense of law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."⁹⁷ And this declaration of Lush, J., is perhaps the best categorical statement of the subject yet made. But it does not explain the part that consideration plays in the general theory of contract. And therefore we purpose to explain briefly the meaning of consideration and what its necessary elements are, and then show its application to the theory of bills and notes.

Consideration is the accepted evidence of the fact that the parties to a contract intend to enter into a binding legal obligation. In examining all contracts the courts first ask themselves whether there was a mutually communicated intention common between the parties to act or forbear towards one another, and if they find there was, then they ask whether the agreement made between the parties was such that it must be enforced. And the other terms, elements, and conditions of the agreement being according to law, the test whether it is a binding legal obligation and

⁹⁵ See N. I. L. § 25; *Crosier v. Crosier*, 215 Mass. 535, 102 N. E. 901 (N. I. L.); *Williams v. Hasshagen* (Cal.) 137 Pac. 9; *Nicholson v. Neary* (Wash.) 137 Pac. 492 (N. I. L.); *Weschler v. J. A. McCarthy & Bro.* (Sup.) 145 N. Y. Supp. 895 (N. I. L.); *Nelson v. Diffendorfer* (Mo. App.) 163 S. W. 271 (N. I. L.).

⁹⁶ *Currie v. Misa*, L. R. 10 Exch. 153.

⁹⁷ Com. Dig. "Action on the Case," bk. 1, p. 15. See *National Park Bank of New York v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927 (N. I. L.).

one to be enforced turns upon the question whether or not there was present a legal consideration. The consideration, in law, therefore, is the reason for making the contract. If it is present the courts assume that the parties intended to enter into a legal obligation; if absent, then, although there may have been a promise or meeting of the minds, yet there is no legal reason why this promise should not be retracted or this consensus revoked, because neither party has lost or gained anything of substantial value. The agreement is too frivolous for courts to consider, and is said to be "nudum pactum ex quo non oritur actio."

The first element of a consideration is that it must have value. According to Sir William Anson,⁸⁸ the matter of a legal obligation must possess or must be reducible to a pecuniary value. This merely means that there must be some ascertainable quid pro quo. Mr. Langdell, in his summary of the law of contracts, shows the evolution of the theory of consideration from the exact quid pro quo necessary to create a debt to the varieties of consideration stated in the definition of Lush, J., which are sufficient to support an assumpsit. There it appears that the doctrine of consideration originated in the action of debt, which originally was an action to recover an exact sum of money loaned belonging to the creditor, but in fact in the possession of the debtor. The right was in the creditor to recover of the debtor the possession of his money which the debtor thus held. From these rudimentary notions the idea of consideration as a basis of the action of debt was developed through various stages until it reached the point that the consideration of contracts of debt required (1) that the consideration given or done should be given or done to the obligor directly, (2) and for him directly; (3) that it should be received by the obligor as the full equivalent for the obligation assumed, and (4) be actually executed. But at all times the contract which was the basis of debt require that there be an exact quid pro quo between its parties. And in case of debt, unless all these elements of consideration were present, the creditor or obligee could

⁸⁸ Anson, Cont. pp. 6, 7; Poll. Cont. p. 8.

not have his remedy in an action of debt, because all of these considerations were of the essence of debt. By the statute of Edw. I,¹ the action of assumpsit was created to reach that large class of cases which were not debts, but yet were analogous to them. These were seen to be a class of rights which were evidently rights based upon some sort of an agreement, which, however, was not in its turn based upon a consideration complying with all the requisites we have stated. The contract had not a consideration sufficient for it to support an action of debt. By the later rule the agreements for which assumpsit lay need not have an exact quid pro quo, but there was, nevertheless, required some exchange of values in it for the agreement to be binding in law, or so that it could be enforced by courts in assumpsit. Hence the doctrine of consideration sufficient to support an assumpsit was developed into its present stage, its necessary elements being those stated in the definition of Lush, J., already given. And thus we find that the courts have held a sufficient consideration to be a cross-acceptance,² or the forbearance of the debt of a third person,³ or the compromise of a disputed liability,⁴ or a promise to give up a bill thought to be invalid,⁵ or a debt barred by the statute of limitations,⁶ or a debt discharged in bankruptcy.⁶ The courts, on the other hand, have held insufficient considerations to be a mere moral obligation,⁷ or a debt represented to be due, though not really due,⁸ or the

¹ 13 Edw. I, c. 24.

¹ Rose v. Sims, 1 Barn. & Adol. 526.

² Balfour v. Sea Fire Life Assur. Co., 3 C. B. (N. S.) 300; Meltzer v. Doll, 91 N. Y. 365.

³ Cook v. Wright, 30 Law J. Q. B. 321.

⁴ Smith v. Smith, 13 C. B. (N. S.) 418.

⁵ La Touche v. La Touche, 3 Hurl. & C. 576 (it was held in this case that a promissory note given by a married woman as a security for advances made to her husband, and which in equity binds her separate estate, is a good consideration for another promissory note given by her after her husband's death for a balance then due, although the former note is barred by the statute of limitations); Wilton v. Eaton, 127 Mass. 174.

⁶ Trueman v. Fenton, Cowp. 544.

⁷ Eastwood v. Kenyon, 11 Adol. & El. 488.

⁸ Southall v. Rigg, 11 C. B. 481.

giving up a void note,⁹ or a voluntary gift of money.¹⁰ And the distinction between these cases rests upon whether the different considerations are or are not of any actual value.¹¹

If there is actual value it will suffice, irrespective of the fact of its adequacy. The courts do not sit to make bargains for the parties. Their only inquiry is whether one has been made. And whether, therefore, the party making the bargain has gained or lost by it is immaterial, so far as its legality as an obligation is concerned.¹² And the rule is well settled that the consideration need not be adequate, though it must be of value. But there is the distinction¹³ made between a valuable consideration other than money and a money consideration. With a valuable consideration other than money, the slightest consideration will support a promise to pay the largest amount to the full extent of the promise, while with a money consideration the consideration will support a promise to pay money only to the extent of the money forming the consideration. The law is deemed to leave the measure of the value of a valuable consideration other than money for a promise to pay money to the parties to the contract; but money, being the standard of value, is not subject to be changed by

⁹ Coward v. Hughes, 1 Kay & J. 443.

¹⁰ Hill v. Wilson, L. R. 8 Ch. App. 894.

¹¹ Professor Ames maintains that a bill or note, even between the original parties, is valid without consideration, and that the contrary notion "is erroneous upon principle, and also upon the authorities; for, although it must be conceded that the courts have sanctioned the defense of absence of consideration in certain cases [where a bill or note is executed as a gift * * * * * * * *], these decisions should be regarded as anomalous exceptions to the rule that a bill, being in the nature of a specialty, is obligatory without consideration, rather than as illustrations of the opposite doctrine that a bill, being a simple contract, requires consideration to support it." His classification of the authorities in support of this position should be consulted. 2 Ames Cas. Bills & N. 876.

¹² Pilkington v. Scott, 15 Mees. & W. 660; Bainbridge v. Firmstone, 8 Adol. & E. 743; Darrow v. Walker, 48 N. Y. Super. Ct. 6.

¹³ Sawyer v. McLouth, 46 Barb. (N. Y.) 350; Johns. Cas. Bills & N. 175.

contract, and will support a promise to pay money only to the amount of the consideration.

Consideration is also classified as to the time at which it is given, as executory, executed, and past. An executory consideration is something to be given or done in the future; an executed consideration is some act or forbearance done at the time of making the contract;¹⁴ and a past consideration is one fully performed before the agreement or transaction which is the basis of the contract relation sought to be created has come into existence. The two former satisfy the test of a consideration that it be sufficient to create a legal obligation. Each of them is a sufficient legal reason for supporting a contract relation. But the third does not satisfy that test. Whatever the transaction constituting the past consideration may have been, it is no part of the transaction upon which the contract is based. There may have been some moral obligation created by it. It may have been the motive for making the new contract. But neither of these cases has the pecuniary value which is required for a consideration, and neither can be treated as a consideration sufficient to support a new contract,¹⁵ although it may be their outgrowth. A past consideration is therefore to be rejected from considerations sufficient to support contracts—a fact to be kept in mind in the examination of the question commonly known as the theory of the antecedent indebtedness, hereinafter discussed.¹⁶

Presumption of Consideration

Before taking up the phases of want, failure, or illegality of consideration, so common in cases of bills and notes, it remains to speak briefly of the meaning of that common phrase that with negotiable instruments, in the first instance, consideration is presumed.¹⁷ This relates to con-

¹⁴ Leake, Cont. 181.

¹⁵ Lawson, Cont. § 100; Anson, Cont. pp. 77-81; Clark, Cont. §§ 84-90.

¹⁶ See page 418, post.

¹⁷ Whether this presumption applies to non-negotiable promissory notes is a question upon which the cases differ, and is affected by

troveries between immediate parties, and means that the instrument itself is *prima facie* evidence of consideration sufficient to sustain the plaintiff's case.¹⁸ But where the issue between immediate parties specifically pleaded is want of consideration, and the defendant introduces evidence in rebuttal of the presumption, the burden of evidence is on the plaintiff, and it remains for him to satisfy the jury that there was a consideration by preponderance of evidence.¹⁹ The fact that a consideration has been given is stated in the instrument, and that the instrument is in writing does not exclude oral evidence concerning the

statute. Daniel, *Neg. Inst.* §§ 162, 163. It was held not to prevail in *Bristol v. Warner*, 19 Conn. 7. *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424 (under 1 Rev. St. 768, repealed by N. I. L.), contra. See *Deyo v. Thompson*, 65 N. Y. Supp. 459 (N. I. L.). N. I. L. § 24, provides that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration," etc. Section 184 defines "a negotiable promissory note" as "an unconditional promise * * * to pay * * * a sum certain in money to order or bearer." In the English Bills of Exchange Act, on the other hand, in the definition of a "promissory note" (section 83), the words are, "to, or to the order of, a specified person or to bearer." It is not essential that the instrument should recite that it is for value received. *Emery v. Bartlett*, 2 Ld. Raym. 1556; *Franklin v. March*, 6 N. H. 364, 25 Am. Dec. 462; *Mehlberg v. Fisher*, 24 Wis. 607. See N. I. L. § 6; ante, p. 10.

¹⁸ *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424; *Marine Trust Co. v. St. James' A. M. E. Church* (N. J.) 88 Atl. 1075 (N. I. L.); *McQuillan v. Eckerson* (Mich.) 144 N. W. 510; *Taulbee v. Lewis & Chambers* (Ky.) 161 S. W. 1100 (N. I. L.). A general denial is insufficient to raise the issue of consideration. *Sprague v. Sprague*, 80 Hun, 285, 30 N. Y. Supp. 162.

¹⁹ *Bruyn v. Russell*, 60 Hun, 280, 14 N. Y. Supp. 591; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 728; *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324; *Delano v. Bartlett*, 6 Cush. (N. Y.) 384; *Anthony v. Harrison*, 14 Hun (N. Y.) 198. But possibly a contrary doctrine is held in *Bottum v. Scott*, 11 N. Y. St. Rep. 514; *Olsen v. Ensign*, 7 Misc. Rep. 682, 28 N. Y. Supp. 38; *Bringman v. Von Glahn*, 71 App. Div. 537, 75 N. Y. Supp. 845 (N. I. L.). See *Lombard v. Bryne*, 194 Mass. 236, 80 N. E. 489 (N. I. L.); *Ginn v. Dolan*, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. Rep. 761, 18 Ann. Cas. 204 (N. I. L.); *Vaughan v. Bass* (Ala. App.) 64 South. 543 (N. I. L.); *Nicholson v. Neary* (Wash.) 137 Pac. 492 (N. I. L.).

consideration. And if the instrument was without consideration in fact, although it is stated on its face to have been given for a consideration, this may be shown by extrinsic testimony²⁰ when the issue is as to the consideration. It seems to have been the early doctrine that, in order to enable the defendant to put the plaintiff on proof of consideration, he must give the plaintiff notice. But it is the rule of practice at present that a notice to prove consideration is unnecessary, and it is not now given. An allegation in the answer that the note is without consideration is sufficient. At present the plaintiff makes out his *prima facie* case; the defendant then gives evidence in dispute of the consideration—whereupon the plaintiff calls his witnesses in rebuttal of this, to prove it.²¹

112. Defenses interposed by reason of some defect in the consideration are usually want or failure of consideration, and illegality of consideration, where it does not avoid the instrument.
113. As between immediate parties, a partial want or failure of consideration is a defense *pro tanto*, but the part alleged to have failed must be clearly ascertained. But these are not defenses to an action brought by a purchaser of the instrument for value without notice.
114. When there is a total want of consideration between immediate parties, or the consideration of the note, though good in the first instance, entirely fails, this is a defense between immediate parties. But these are not defenses to an action brought by a purchaser of the instrument for value without notice.

In the preceding section, in attempting to outline the fundamental theory underlying that very large branch of the subject of negotiable instruments,—consideration,—we

²⁰ Abb. Tr. Ev. pp. 404, 405.

²¹ See Wood's notes to Byles, Bills & N. pp. 121, 122.

endeavored to show that the rule was that the first test of a legal consideration was that it must have substantial value, and that if there was substantial value, and an agreement, then there was a legal contract. From this it naturally follows that the converse of this rule is also true, and that if there is not a consideration to support the contract, or if there is what seems to be, but in fact is not, a consideration then the contract itself fails, and the contract will not be enforced by the courts. The doctrines of want or failure of consideration divide themselves into the questions arising from total want or failure of consideration, partial want or failure of consideration, and the comparative equities of the rights of immediate parties and of the bona fide holder. The doctrine of failure or want of consideration is to be scrutinized to distinguish between failure of consideration and inadequacy of consideration; between whole and partial failure of consideration; and between definite and indefinite want or failure of consideration. And, while it cannot be said that these positions are fully settled by authority, the general doctrines of the cases classify the rules relating to want or failure of consideration as follows:

- (1) Total failure or want of consideration is a defense in an action between immediate parties.
- (2) In case of a pecuniary consideration or of property having an agreed pecuniary standard, failure of a definite part of the consideration is a defense pro tanto between immediate parties.
- (3) In case of partial failure of an unliquidated consideration, recoupment or counterclaim may be allowed.
- (4) A want of a defined part of a consideration is a defense pro tanto.
- (5) Defenses of total or partial failure or want of consideration do not avail against the purchaser for value without notice.

Failure or want of consideration is not the same thing as its inadequacy. Inadequacy means that where values are exchanged one value does not equal the other; failure of consideration means a diminution of value from that ex-

pressly or impliedly agreed to be the values exchanged in transfer; and want of consideration means no value at all given for value received. In the transfer of property the fact that the property was not worth what it was supposed to be, if there is no fraud, is no defense in an action for the purchase price. And when the question is one of adequacy, courts will not inquire into the actual pecuniary value of a consideration, but will leave the parties to such estimates thereof as they have formed in making their contract. A party will not be allowed to interpose as a defense the fact that the property was not pecuniarily worth what he supposed it to be, or that he has received no actual benefit from it, or that the other party derives greater benefit from the consideration than he does. And inadequacy is distinguished from failure or want of consideration in that at the time of making the bill or note no part of the consideration was wanting, or that no part of it had subsequently failed. It was complete on making the contract, and had changed in no respect at the time of bringing the action. The amount agreed to be paid in the bill or note was the value set by the parties upon the consideration itself, and courts do not sit to change this and to make contracts, but only to enforce those the parties have already made.²²

Except, then, where money is paid for a bill or note, any other valuable thing will suffice as a reason for the enforcement of the instrument. In such cases as a voluntary gift of a note;²³ or its indorsement as a gift;²⁴ or where

²² WORTH v. CASE, 42 N. Y. 362, Moore Cases Bills and Notes, 84; Earl v. Peck, 64 N. Y. 596; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; Anson, Cont. 63; Shadwell v. Shadwell, 9 C. B. (N. S.) 159; Lindell v. Rokes, 60 Mo. 249, 21 Am. Rep. 395; Trickey v. Larne, 6 Mees. & W. 278; Tye v. Gwynne, 2 Camp. 346. N. I. L. § 28, provides: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."

²³ Pearson v. Pearson, 7 Johns. (N. Y.) 26; STARR v. STARR, 9 Ohio St. 74, Moore Cases Bills and Notes, 188. A gift of the

²⁴ Schoonmaker v. Roosa, 17 Johns. (N. Y.) 301.

a plaintiff and defendant, as executors of an estate, exchanged notes with the intent of assuring payment against each other in an impending arbitration, and it was sought to construe these notes as promises which charge them personally;²⁵ or where two persons gave notes contingent upon the fact that, if they were paid in the future, the payee would convey to him certain lands, which in fact were never conveyed—in all such cases, we say, there is no consideration for the promise. In them the promise is a *nudum pactum*. The courts will not compel parties to pay money to a party from whom they, in turn, had received nothing. Hence the entire want of consideration between immediate parties destroys all remedy upon the bill or note, because, as between immediate parties, the negotiable instrument is governed in this respect by the general rules of contract law.

These reasons, however, do not apply where the consideration has changed in whole or in part from that in contemplation of the parties at the time of making the contract. Its change may have rendered it either totally or partially worthless. In case of partial worthlessness, the worthless part may be a clearly defined part of the whole, or be indissolubly bound up with it. And these aspects of failure of consideration, when complicated with the various

donor's own note or bill is not valid either as a gift *inter vivos* or as *donatio mortis causa*. *Holliday v. Atkinson*, 5 Barn. & C. 501; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352; *Raymond v. Sellick*, 10 Conn. 480; *Warren v. Durfee*, 126 Mass. 338; *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608; *Tracy v. Alvord*, 118 Cal. 654, 50 Pac. 757. But a man may make a valid gift of a bill or note made by a third person, and the property will pass, although, for lack of consideration, the donor will not be liable as indorser. *Easton v. Pratchett*, 1 Cromp., M. & R. 808. The holder may make a valid gift as *donatio mortis causa*, nor need the instrument be indorsed. *Rankin v. Weguelin*, 27 Beav. 309; *Grover v. Grover*, 24 Pick. (Mass.) 264, 35 Am. Dec. 319; *Jones v. Deyer*, 16 Ala. 226; *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173. In such case the donee may recover against the prior parties, although not against the donor or his representatives upon the indorsement. *Weston v. Hight*, 17 Me. 287, 35 Am. Dec. 250. As to *donatio mortis causa*, see *Rand. Com. Paper*, §§ 454, 805-810; *Daniel, Neg. Inst.* §§ 24-26a.

²⁵ *Winter v. Livingston*, 13 Johns. (N. Y.) 54. See preceding note.

different systems of the administration of remedies, have presented problems of some difficulty for the courts to decide, and this difficulty has resulted in some confusion in the decisions of various jurisdictions. The rules are the same whether the consideration which fails be executed or executory. Examples of an executed consideration which has failed are property for which a note has been given, but which has been taken in execution,²⁶ or notes given for insurance premiums upon the policy of a company which has no legal right to insure.²⁷ In both of these cases it was held that there was a total failure of consideration, and that, as between immediate parties, it was a sufficient defense.²⁸ The availability of this as a defense, however, seems to depend upon two alternatives. The transaction either must be at once rescinded, the consideration returned, and the parties placed as nearly as may be in statu

²⁶ *Chenault v. Bush*, 84 Ky. 528, 2 S. W. 160.

²⁷ *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221.

²⁸ *Lightbody v. Ontario Bank*, 11 Wend. (N. Y.) 9. This was a case where bank bills were received in payment, and the bank issuing the bills had stopped payment at the time when the bills were so received, but the fact of the bank's failure was not then known to the parties. In his decision, Savage, C. J., said: "The question is which of these parties shall sustain the loss which has happened in this case. * * * In the case of the payment of a counterfeit or forged bill, it is settled that the debtor is not discharged, and it is not perceived why the same principle should not prevail where the payment is made in the bill of a bank which has stopped payment. In each case the debtor parts with that which has no value, and the creditor does not receive value for his debt." In the case of *Camidge v. Allenby*, 6 Barn. & C. 373, 9 Dowl. & R. 391, it appeared that a vendee delivered to the vendor, in payment for goods, promissory notes on the bank of D. & Co. This occurred at 3 o'clock in the afternoon, and D. & Co. stopped payment at 11 o'clock in the forenoon of the same day (December 10th). The vendor never presented the bills, but on December 17th he required the vendee to take back the notes, and pay him the amount. This was refused, and on trial it was held that the vendor was guilty of laches, and had thereby made the notes his own, and consequently that they operated as a satisfaction of the debt. In the case of *Bayard v. Shunk*, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441, it was held that the debt was discharged by a payment in bank notes, though the bank had previously failed, both parties being ignorant of the fact.

quo,²⁰ or else the consideration must be proved to be completely worthless, for otherwise, if the consideration be retained, the question is sometimes treated as one of inadequacy, and the obligation may be deemed binding.²¹ Cases of executory consideration are where the purchaser of a patent gave his note for it and the patent subsequently proved void,²² or where a vendee bought goods of a certain kind which the vendee failed to deliver.²³ In such cases the rules are also either that there must be instant rejection of the goods after an opportunity to examine them, or else the goods must be shown to have been valueless. Of course, if there was involved in the facts of the case a breach of warranty which survives the acceptance of the goods, it lays the basis for a cross action or counter-claim, and is an exception to the principle stated.²⁴ It is the better rule in case of executory considerations that, as between immediate parties, a partial performance of the consideration allows only a recovery for the part performed upon the bill or note given for the consideration itself,²⁵ though this rule is disputed by many cases.²⁶ This conflict of authorities is due not so much perhaps to the actual merits of the question as to rules of practice arising upon questions of recoupment, offset, cross-demand, and counterclaim, and whether these remedies may be administered in the action in which recovery upon the bill or note is

²⁰ Burton v. Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Lewis v. Cosgrave, 2 Taunt. 2; Leggett v. Cooper, 2 Starkie, 103; Fisher v. Samuda, 1 Camp. 191.

²¹ Burton v. Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Johnson v. Titus, 2 Hill (N. Y.) 606.

²² Dickinson v. Hall, 14 Pick. (Mass.) 217, 25 Am. Dec. 390.

²³ Wells v. Hopkins, 5 Mees. & W. 7.

²⁴ Norton v. Dreyfuss, 106 N. Y. 91, 12 N. E. 428; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719.

²⁵ Sawyer v. Chambers, 44 Barb. (N. Y.) 43; Union Foundry & Pullman Car Wheel Works v. New York Lumber Drying Co., 13 N. Y. St. Rep. 701; Fisher v. Sharpe, 5 Daly (N. Y.) 214; Murphy v. Lippe, 35 N. Y. Super. Ct. 542.

²⁶ Fletcher v. Chase, 16 N. H. 38; Stone v. Peake, 16 Vt. 218; Harrington v. Lee, 33 Vt. 249; Evans v. Williamson, 79 N. C. 86.

sought. But these questions are happily becoming obsolete as state after state substitutes the civil action and code procedure for the common-law action and equity suit. The provision of the Codes that a defendant may avail himself of any defense which tends to defeat or diminish the plaintiff's recovery and which is a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action, or that it may be any new matter constituting a defense, it is hoped will allow the establishment of a rule that a failure of a part of the consideration, if definite, will allow a recovery pro tanto; if indefinite, a recoupment of damages. Now, however, the rules seem to be somewhat ill-defined, but as nearly as may be stated are as follows:

(1) If there is entire failure to give good title to chattels or land it is a defense;³⁶ if it is a mere defect of title capable of ascertainment in money, and the loss is borne by the purchaser, it is a defense pro tanto;³⁷ if it is a defect in which the loss is not borne by the purchaser, it is not a defense.³⁸

(2) If the failure is of part of a money consideration, or one capable of definite computation, it is a good defense pro tanto.³⁹

(3) If the failure is in the value of goods delivered, and is incapable of ascertainment, it is no defense, being in the nature of inadequacy of consideration, as already shown. But if this failure in value is a distinct part of the consideration, and is due either to a failure of the quality or the quantity of the goods, it is a defense pro tanto.⁴⁰

³⁶ *Rock v. Nichols*, 3 Allen (Mass.) 342; *Morrow v. Brown*, 31 Ind. 378; *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581; *Stewart v. Insall*, 9 Tex. 397.

³⁷ *Doremus v. Bond*, 8 Blackf. (Ind.) 368; *Holman v. Creagmiles*, 14 Ind. 177.

³⁸ *Bingham v. Leighty*, 61 Ind. 524.

³⁹ *Byles, Bills*, 132; *Chit. Bills*, 86; 1 Edw. Bills & N. 469; *Darnell v. Williams*, 2 Starkie, 166; *Jefferies v. Austin, Strange*, 674; *Gamble v. Grimes*, 2 Ind. 392; *Morgan v. Fallenstein*, 27 Ill. 31; *Black v. Ridgway*, 131 Mass. 80.

⁴⁰ *Agra & Masterman's Bank v. Leighton*, L. R. 2 Exch. 56. It

(4) If the failure of consideration arises from failure to perform an agreement, it is a defense *pro tanto*.⁴¹

These reasons apply to want of consideration,⁴² or want of a defined part of it.⁴³ In the former event the contract is unenforceable; in the latter, enforceable only *pro tanto*.⁴⁴ And this leaves us to consider the position of the bona fide holder when confronted with these defenses raised against him.

The purchaser for value without notice purchases upon a consideration an order or promise to pay money. He is not bound in any way to inquire into the circumstances which gave the paper birth. If, for example, the maker defends that the consideration for a note is a contract which is wholly or partly unperformed, and the consideration has so far failed, the answer is that the maker has issued to the world a negotiable promise to pay money absolutely in consideration of the promise of the payee to do some act for his benefit in the future. That the payee has failed to do this is no reason why the bona fide holder should be deprived of the benefit of the maker's promise, which he has bought. He has taken no part in the delinquencies of

was held in this case that, in an action by the indorsee of a bill of exchange against the acceptor, a plea stating that the bill was given for goods to be supplied by the drawer, and that only part of the goods were supplied, of which the defendant accepted a part, and that by reason of the noncompletion of the contract the part supplied became valueless to him, and also showing that the plaintiff is not a holder for value, will be good. And see *Dunnent v. Tuttle, Johns. Cas. Bills & N.* 178; *Hammett v. Barnard*, 1 Hun (N. Y.) 198. Though see cases holding no defense unless there was a warranty. *Welsh v. Carter*, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473; *Reed v. Prentiss*, 1 N. H. 174, 8 Am. Dec. 50; *Bryant v. Pember*, 45 Vt. 487; *Detrick v. McGlone*, 46 Ind. 291; *Richards v. Betzer*, 53 Ill. 466.

⁴¹ *Watson v. Russell*, 3 Best & S. 34; *Miller v. Wood*, 23 Ark. 546; *Jeffries v. Lamb*, 73 Ind. 202; *Stacy v. Kemp*, 97 Mass. 186. See N. I. L. § 28; *Hill v. Dillon* (Mo. App.) 161 S. W. 881 (N. I. L.); *Dicks v. Johnson* (Fla.) 63 South. 700 (N. I. L.).

⁴² *Anthony v. Harrison*, 14 Hun (N. Y.) 198.

⁴³ *Seeley v. Engell*, 13 N. Y. 542.

⁴⁴ *Aubert v. Maze*, 2 Bos. & P. 373; *Forman v. Wright*, 11 C. B. 481; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378.

the payee, and they therefore cannot be charged against him. In other words, his equities are superior to those of the maker, who must look for his remedy to the payee.⁴⁵ And so in the other cases involving want or failure of consideration, the defenses consist of personal transactions between immediate parties, in which the bona fide holder has no part, and with which he is not chargeable. The reasons for holding accommodation parties have been already explained.⁴⁶ And in other cases already mentioned, as for patents proven void,⁴⁷ or for the purchase of lands to which the title fails,⁴⁸ or for goods purchased and partly delivered,⁴⁹ the answer is the same—that an absolute promise or acceptance to pay to order has been issued, and must be lived up to, when in the hands of a purchaser who has bought it in reliance upon the promise. Neither total nor partial want or failure of consideration is a defense against a bona fide purchaser for value without notice.⁵⁰

115. ILLEGAL CONSIDERATION—A consideration may be rendered illegal by statute, or by the rules of common law, or because it is against public welfare to treat the consideration as a valid legal consideration. An illegal consideration, whether total or partial, renders the instrument unenforceable, as between immediate parties, but it is not in general a defense to the action of the purchaser for value without notice.⁵¹

A brief statement of that broad topic of the general law of contracts known as "illegal consideration" is as follows:

⁴⁵ *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461.

⁴⁶ See *supra*, p. 236.

⁴⁷ *Smith v. Hiscock*, 14 Me. 449. See the provision of the New York Negotiable Instruments Law, § 330, as to negotiable instruments given for patent rights.

⁴⁸ *Vallett v. Parker*, 6 Wend. (N. Y.) 615.

⁴⁹ *Baldwin v. Killian*, 63 Ill. 550.

⁵⁰ *Robinson v. Reynolds*, 2 Q. B. 196; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181, 20 L. Ed. 366; *Heuertematte v. Morris*, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657; N. I. L. § 28.

⁵¹ See N. I. L. §§ 55-57; *Campbell v. Offutt*, 151 Ky. 229, 151 S.

Since every contract is but an agreement enforceable by law, to be enforceable it must be for some object which the law can recognize. The law refuses to recognize rights arising out of three general classes of subjects, and to enforce contracts made with reference to them. They are:

(1) Those prohibited by statute.

(2) Those prohibited by express rules of common law with reference to objects which the law deems evil or immoral.

(3) Those which contravene public policy.

*Statutory Prohibition*⁵²

The statutes which prohibit considerations and render them illegal are commonly classified as follows:

(1) Those which forbid a transaction constituting a consideration, and declare the contract growing out of it void.

(2) Those which, for the public welfare, attach a penalty to a transaction constituting a consideration, and thus by implication forbid the making of any contract growing out of it.

(3) Those which declare a consideration illegal, but do not say that it shall avoid the contract.

(4) Those which attach no penalty to a consideration, but which enact that the consideration is illegal, and that the agreement resting upon it shall not be enforced.

(5) Those which enjoin certain penalties, conditions, or regulations upon the conduct of a business or profession, but which attach no specific penalty to any specific transaction.⁵³

These five classes of statutes are in turn distinguished as those which avoid the consideration, either by express declaration, or by imposing a penalty upon it, and those which merely declare the consideration illegal. The important difference between these two classes is that, as already shown, the former is a defense to the instrument

W. 403 (N. I. L.). Compare *Hutchins v. Stanley*, 88 Kan. 739, 129 Pac. 1180.

⁵² As to conflict of laws, see *ante*, p. 246.

⁵³ *Pol. Cont.* pp. 254-261.

in the hands of a bona fide holder,⁵⁴ while the latter is not. The statutes of the latter class, however, so generally outnumber those of the former, that it may be said to be the rule that the title of an innocent holder for value cannot be impeached by any illegality in the transactions between prior parties,⁵⁵ the exceptions being, of course, where the statutes expressly forbid the consideration and avoid the contract growing out of it, or where the plain intention of the penalty affixed by the statute to the transaction is to forbid it, and thus the contract is avoided. The reason for this rule is the one so general in cases involving consideration, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.⁵⁶ It is true that the innocent maker or acceptor may suffer from the violation of a statute which was perhaps meant to protect him. Either or both of these prior parties may have done something forbidden, and the court in enforcing the bill or note may be enforcing a violation of the statutes, yet the bona fide holder is no accessory to the illegality, nor can the statute be used to shield the wrongdoer. The transaction, whatever it may have been, was one of which the bona fide holder knew nothing, and in which he took no part. The only thing with which he had to do was the purchase of a

⁵⁴ This statement is not strictly accurate. See p. 307, note 67, supra. It was said by Christiancy, J., in *Paton v. Coit*, 5 Mich. 505, 72 Am. Dec. 58, that whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it bona fide, and gave value for it. To the same effect, see *Bailey v. Bidwell*, 13 Mees. & W. 73; *Harvey v. Towers*, 6 Exch. 656; *Northam v. Latouche*, 4 Car. & P. 140; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Story, Bills*, § 193.

⁵⁵ Thus, in *Potter v. Tubb*, 1 Chit. Jr. Bills, 430, which was an action against the acceptor of a bill, by the payee, it was held that the fact the consideration for the acceptance was a debt due to the drawer by the acceptor for smuggled goods was no defense against the plaintiff, unless the bill were given him for a smuggling debt.

⁵⁶ *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Willmarth v. Crawford*, 10 Wend. (N. Y.) 341.

promise or order to pay money, which he asks the court to enforce. And the courts respond to his suit by saying to the prior parties who have suffered by or committed the illegality that their wrongs must be settled elsewhere than in his suit,⁵⁷ and are no answer to his claim.

The statutes which declare a consideration illegal vary widely in their topics and language in the different states. Very common examples are a bill or note executed on Sunday,⁵⁸ or a bill or note given for intoxicating liquors.⁵⁹ These cases are but examples of the general principle, whatever be the wording of the particular statute. Thus, from the New York point of view, before the repeal of the Sabbath observance act,⁶⁰ a contract made on Sunday was not void at common law.⁶¹ And in New York it was declared to be good unless it was in contravention of some express statute forbidding it.⁶² The statute in that state regulating the Sabbath observance was meant to be in harmony with the religion of the state and the religious sentiment of the public, and for the support and maintenance of public morals and good order. Acts which did not violate the purpose of this statute, and did not disturb and hinder those who for themselves desired to enjoy Sunday, were not prohibited.⁶³ Bargains made on Sunday were enforceable. And it is to be inferred that bills and notes given on Sunday were good unless they were for something prohibited by statute to be done, as for the enforce-

⁵⁷ *City Bank v. Bernard*, 1 Hall (N. Y.) 80; *Gould v. Armstrong*, 2 Hall (N. Y.) 290; *Hill v. Northrup*, 4 Thomp. & C. (N. Y.) 120; *Grimes v. Hillenbrand*, 6 Thomp. & C. (N. Y.) 620.

⁵⁸ *Saltmarsh v. Tuthill*, 13 Ala. 390; *Vinton v. Peck*, 14 Mich. 287.

⁵⁹ *Cazet v. Field*, 9 Gray (Mass.) 329; *Norris v. Langley*, 19 N. H. 423; *Pindar v. Barlow*, 31 Vt. 529.

⁶⁰ Laws 1886, c. 593.

⁶¹ A bill or note executed on Sunday is not invalid at common law. *Begbie v. Levi*, 1 Cromp. & J. 180; *Murphy v. Collins*, 121 Mass. 6.

⁶² *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117.

⁶³ *Smith v. Wilcox*, 24 N. Y. 354, 82 Am. Dec. 302.

ment of work done on Sunday exclusively.⁶⁴ So that in New York, although there is little express authority on the point, it seems safe to say that since the Sunday laws in the majority of instances would probably not be treated as defenses to actions upon bills and notes between immediate parties, they would be still less apt to be allowed in case of a suit by the bona fide holder. In other states, as between immediate parties, the question turns first upon the wording and interpretation of the statute itself. If the statute expressly prohibits the making of contracts on Sunday, then it is a defense as between immediate parties. Again, if it provides that no person shall do any work, labor, or business on Sunday, then the making of a bill or note is the making of a contract, is secular business within the meaning of the statute, and is a defense between immediate parties. But if it prohibits only servile work, or the work, labor, or business of a person's ordinary calling, then the making of a bill or note is not within the prohibition of the statute, and the statute does not apply.⁶⁵ Where, however, it is conceded that the statute does apply to the case of the bill or note, then the question becomes one of the delivery of the instrument. The bill, note, or indorsement is not executed until delivered.⁶⁶ And though dated or signed on Sunday,⁶⁷ it has no life as a contract until the day of its delivery. But if dated and signed and delivered on Sunday, or dated and signed on a secular day and delivered on Sunday,⁶⁸ the instrument is unenforceable between immediate parties,⁶⁹ unless the par-

⁶⁴ *Merritt v. Earle*, 31 Barb. (N. Y.) 38, affirmed 29 N. Y. 115, 86 Am. Dec. 292; *Batsford v. Every*, 44 Barb. (N. Y.) 620; *McNamee v. McNamee*, 9 N. Y. St. Rep. 720; *Sun Printing & Pub. Ass'n v. Tribune Ass'n*, 44 N. Y. Super. Ct. 136.

⁶⁵ *Clark*, *Cont.* pp. 394, 395.

⁶⁶ See *supra*, p. 94.

⁶⁷ *Conrad v. Kinzie*, 105 Ind. 281, 4 N. E. 863.

⁶⁸ *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Bank of Cumberland v. Mayberry*, 48 Me. 198.

⁶⁹ *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Pope v. Linn*, 50 Me. 86; *State Capital Bank v. Thompson*, 42 N. H. 370; *Ball v. Powers*, 62 Ga. 757; *Brimhall v. Van Campen*, 8 Minn. 13 (Gll. 1), 82 Am. Dec. 118.

ty prosecuting it shows that it was delivered on a secular day.⁷⁰ The presumption from its being dated on Sunday is that it was delivered on that day, and its date is notice to all parties of its delivery on Sunday, and its invalidity.⁷¹ It is this notice which destroys its validity in the hands of the purchaser for value. For if the instrument is dated on Sunday, he is presumed to know it was delivered on that day, and so is a purchaser with notice. But, on the other hand, if the contract was actually made on Sunday, but there is no legal reason for charging the purchaser for value with knowledge of this fact, then the illegality of the contract is no defense against the bona fide purchaser, and he takes the bill or note free from equities.⁷² Or in other words, to apply the tests given, the Sunday laws are in general of that class which render the consideration illegal, not void, and are therefore not a defense against the purchaser for value, unless he has notice that the bill or note was given in violation of the statute. These tests apply and reasons govern in the application of the statutes which render the bill or note unenforceable, or which seek to regulate the conduct of a business or profession. Examples are the traffic in intoxicating liquors,⁷³ or statutes requiring lawyers, physicians, and surgeons to procure a license, certificate, or diploma as a condition precedent to the right

⁷⁰ *Drake v. Rogers*, 32 Me. 524; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157; *Aldridge v. Branch Bank at Decatur*, 17 Ala. 45; *Trieber v. Commercial Bank of St. Louis*, 31 Ark. 128.

⁷¹ *Hilton v. Houghton*, 35 Me. 143; *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151; *Clough v. Davis*, 9 N. H. 500; *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131; *Cranson v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Sinclair v. Baggaley*, 4 Mees. & W. 312.

⁷² *Pope v. Linn*, 50 Me. 84; *State Capital Bank v. Thompson*, 42 N. H. 370; *Cranson v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Great-head v. Walton*, 40 Conn. 226; *Ball v. Powers*, 82 Ga. 757; *Trieber v. Commercial Bank of St. Louis*, 31 Ark. 128; *Clinton Nat. Bank v. Graves*, 48 Iowa, 228; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28; *Moseley v. Selma Nat. Bank*, 3 Ala. App. 614, 57 South. 91.

⁷³ *Cazet v. Field*, 9 Gray (Mass.) 329; *Norris v. Langley*, 19 N. H. 423; *Pindar v. Barlow*, 31 Vt. 529. Some statutes, however, render void a bill or note given for intoxicating liquors. *Streit v. Sanborn*, 47 Vt. 702; *HANNUM v. RICHARDSON*, 48 Vt. 508, 21 Am. Rep. 152, *Moore Cases Bills and Notes*, 134.

to practice in their profession, or statutes regulating dealings in articles of commerce. These statutes are in general not a defense to negotiable instruments prosecuted by the bona fide holder.

Common-Law Prohibition

Evil or immoral considerations affecting negotiable instruments are those which are made in breach of the well-settled rules of the common law. Bills and notes based upon them are either instruments given in consideration of committing a crime or a civil wrong, or else instruments given upon a consideration in fraud of the rights of third persons. Instances of the first kind are orders or promises in consideration of committing a trespass likely to lead to a breach of the peace, as an assault upon a third person,⁷⁴ or of printing a libel,⁷⁵ or of committing a civil wrong by fraud or false pretenses.⁷⁶ Wherever such are the considerations of a negotiable instrument, the court will refuse to enforce the instrument, as between immediate parties. The agreements based upon a consideration in fraud of the rights of third persons most common in the case of negotiable instruments are when one creditor takes a bill or note for some advantage to himself over other creditors who have united with him in a composition of their debts against some common debtor.⁷⁷ In such a case each creditor acted on the faith that the engagement made with the others would be binding upon them, and each had the undertaking of the rest as a consideration for his own undertaking. The beneficial consideration to each creditor was the engagement of the rest to forbear. "Every composition deed," says Mr. Justice Duer,⁷⁸ "is in its spirit, if not in its terms, an agreement between the creditors them-

⁷⁴ *Allen v. Rescous*, 2 Lev. 174.

⁷⁵ *Poplett v. Stockdale*, 1 Ryan & M. 337; *Arnold v. Clifford*, 2 Sumn. 238, Fed. Cas. No. 555; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

⁷⁶ *Materne v. Horwitz*, 101 N. Y. 470, 5 N. E. 331; *Bloss v. Bloomer*, 23 Barb. (N. Y.) 604; *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597.

⁷⁷ *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886.

⁷⁸ *Breck v. Cole*, 4 Sandf. (N. Y.) 79-83.

selves, as well as between them and the debtor. It is an agreement that each shall receive the sum of the security which the deed stipulates to be paid and given, and nothing more." A private agreement, evidenced by a bill or note, therefore, by any one creditor, to receive more than his composite share, is a fraud upon the rest, and the courts will not enforce it.⁷⁹

Contravention of Public Policy

The commonest cases of bills and notes given in contravention of public policy are those based upon considerations tending either to injure the public service, or obstruct the public justice, or else based upon considerations in restraint of trade.

"All contracts or agreements," says Comyn, "which have for their object anything against the general policy of the common law are void."⁸⁰ This general principle is particularly applied to contracts which have for their object the perversion of the operations of the government.⁸¹ Every citizen owes to his government and all its officers, while executing their official duties, truth and fidelity. All the actions of the government and its officers are based upon certain facts assumed or proved, and falsehoods with reference to those facts are moral wrongs, injurious to the whole state whose government it is, and therefore against public policy. Thus, a note given for forbearing to make a bid on a government mail contract,⁸² or a note given to procure the passage of a legislative act by sinister means, is void.⁸³ It is public policy for the courts to put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of

⁷⁹ Bliss v. Matteson, 45 N. Y. 22.

⁸⁰ 1 Com. Cont. 301; Fonbl. Eq. bk. 1, c. 4, § 4.

⁸¹ Gray v. Hook, 4 N. Y. 449.

⁸² Gulick v. Ward, 10 N. J. Law, 87, 18 Am. Dec. 389.

⁸³ Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Fuller v. Dame, 18 Pick. (Mass.) 479; Sedgwick v. Stanton, 14 N. Y. 289; Frost v. Inhabitants of Belmont, 6 Allen (Mass.) 159; Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868; Marshall v. Baltimore & O. R. Co., 16 How. 314, 14 L. Ed. 953.

which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is committed. These are also the reasons of the common-law rules with reference to considerations touching the administration of public justice.⁸⁴ The public welfare requires that crimes, for example, should be investigated and punished, and it is the duty of a citizen paramount to all others to give every assistance to this end.⁸⁵ Every instrument given in pursuance of an agreement to obstruct justice as between immediate parties is void. Therefore a note given to stop an intended prosecution for felony and not to appear as a witness before the grand jury, and to dismiss an action for assault and battery,⁸⁶ or a note given upon a consideration not to prosecute the maker's son for forgery,⁸⁷ is illegal, and cannot be enforced. Agreements based upon a consideration in restraint of trade are held against public policy because they deprive the public of the services of men in the spheres in which they are likely to be most useful, and expose the community to the evils of monopoly. At least such, according to the text writers, was the doctrine of the early common law. The cases were classified into three divisions, and the rules pertaining to them were as follows: (1) When the contract was unlimited in time and space and in total restraint of trade, it was void. (2) When the restraint was limited as to space, but unlimited as to time, it was valid. (3) When the contract was unlimited as to space, but limited as to time, it was void. And these were the tests applied in determining whether bills and notes were void or valid as between immediate parties in cases when the defense that the consideration was in restraint of trade was interposed. So coal combinations are in restraint of trade, and a check given for a balance due on such a combination agreement

⁸⁴ *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Roll v. Raguet*, 4 Ohio, 400, 418, 22 Am. Dec. 759; *Gorham v. Keyes*, 137 Mass. 583; *Harris v. Brisco*, 17 Q. B. Div. 504.

⁸⁵ *Haynes v. Rudd*, 83 N. Y. 251. See, also, *Id.*, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815.

⁸⁶ *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90.

⁸⁷ *National Bank of Oxford v. Kirk*, 90 Pa. 49.

is illegal.⁸⁸ And so a bill or note given to further the objects of an association for the regulation of freight and passage rates on the Erie Canal is illegal.⁸⁹ In these cases it is obvious that such contracts are public in their nature and against the public welfare. With them the reason for the application of the general rule is clear. But when the consideration involves a transaction between private individuals, the early doctrines of the common law are not those at present accepted by the courts. Thus instruments based upon a consideration in partial restraint of trade between individuals are undoubtedly allowed, the distinguishing point being that the restriction must not go beyond what is reasonable to protect the favored party, regard being had to the nature of the business and the interests of the public.⁹⁰ And it is worthy of remark that the tendency of recent decisions is to relax even further the rigor of the doctrine that all contracts in general restraint of trade are void. In England⁹¹ it is denied that such has, in fact, ever been the law, and that such a rule is the true public policy is doubted. "If," said Sir George Jessel,⁹² "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice. The theory that such contracts create monopolies is also to be questioned. Competition is not stifled. The business is open to all other persons. And it seems a sounder legal theory to say that a party may legally pur-

⁸⁸ Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159.

⁸⁹ Stanton v. Allen, 5 Denio (N. Y.) 434, 49 Am. Rep. 282.

⁹⁰ Mitchel v. Reynolds, 1 P. Wms. 181. See cases chronologically arranged in 2 Pars. Cont. p. 748, note; Nobles v. Bates, 7 Cow. (N. Y.) 307; Chappel v. Brockway, 21 Wend. (N. Y.) 157; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Rep. 119; Arnot v. Pittston & E. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190.

⁹¹ Rousillon v. Rousillon, 14 Ch. Div. 351.

⁹² Printing & Numerical Registering Co. v. Sampson, 19 Eq. Cas. 462.

chase the trade and business of another for the very purpose of preventing competition. The validity of the contract, if supported by a consideration, will depend upon the reasonableness between the parties.⁹³

Effect of Illegality

Such are the most important classifications of the very large number of cases involving bills and notes given upon considerations in violation of statutes, of rules of common law, and in contravention of public policy. It remains to speak of the effect of the illegality of considerations being total or partial, of the illegality being known to all the parties, and the rule governing illegal or immoral considerations, and those in contravention of public policy, when used as defenses to actions brought by a purchaser of the instrument for value and without notice.

Same—Illegality as being Total or Partial

Partial illegality of consideration is to be distinguished from partial lack or failure of consideration, in that illegality, whether it goes to the whole consideration or only part thereof, avoids the whole bill or note. If any part of a contract is void for illegality, all of it is void. The courts will not unravel and separate considerations which are good and considerations which are illegal, and allow recovery for those which are good. In this, illegal considerations which avoid the instrument differ from instruments which cannot be enforced because of partial lack or failure of consideration, the latter being, as has already been said, good *pro tanto*. And this is so because it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the maker or acceptor in making his promise. The law will not permit him thus to seek to evade its provisions and yet stand upon and re-

⁹³ Whittaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Leather Cloth Co. v. Lorsont, 9 Eq. Cas. 345; Collins v. Locke, 4 App. Cas. 674; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315; Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Diamond Match Co. v. Roebur, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.

cover for the valid part of the original consideration. Negotiable instruments are not contracts consisting of several parts based on several transactions. They are not of the kind called in ordinary contract law "severable." As to them the general rule of contracts that, where the promises and considerations are severable, an illegal consideration is a partial defense, does not apply. But on the contrary, the undoubted rule is that any of the foregoing kinds of illegal considerations, whether total or partial, are defenses to the recovery upon any part of the instrument between immediate parties.

Same—Knowledge of Consideration—Intention

It must be admitted that comparatively few cases directly involving bills and notes are to be found in examining the question of the knowledge of a party of the illegality of a consideration. But there seems to be no reason why the well-settled rules of contract should not be applied to the case of immediate parties to negotiable instruments. The combinations of circumstances to which these rules of contract apply are where the consideration consists of some illegal act, which it is the mutual intention of the parties to perform; where it consists of some act legal in itself, but mutually intended to further some illegal purpose; where one party intends an illegal act, but the other is innocent of any knowledge concerning it; and, lastly, where one party intends an illegal act and the other party knows of it, but is innocent of any participation in it. In the case of the consideration consisting of some illegal act in which both of the parties participate, courts will not enforce the instrument, because courts cannot enforce a violation of law.⁹⁴ This rule is broad enough to cover the case of a legal consideration intended to further an illegal intent, because the parties may not use a legal act to cover a wrong, provided that their intention to commit a wrong was mutual,⁹⁵ and the loan of money evidenced by the bill or note

⁹⁴ *McKinnell v. Robinson*, 3 Mees. & W. 434; *Cutler v. Welsh*, 43 N. H. 497; *Mordecai v. Dawkins*, 9 Rich. (S. C.) 202.

⁹⁵ *Blont v. Proctor*, 5 Blackf. (Ind.) 265; *Cannan v. Bryce*, 3 Barn. & Ald. 179.

was in furtherance of the parties' unlawful purpose.⁹⁶ But, on the other hand, if the contract was innocent in itself, and if the party enforcing the bill or note was ignorant of the illegal intention of the other party, he is entitled to its full benefits,⁹⁷ and the courts will not shield the other party, because he alone has attempted to further some illegal purpose of his own. But the purpose and consideration of the instrument must be innocent and legal, for if illegal, although its illegality was unknown to the prosecuting party, it is unenforceable, for the courts, from their very constitution, cannot enforce negotiable instruments upon an illegal consideration, and the ignorance of the party himself of the fact that that consideration was in violation of the law does not excuse him.⁹⁸ Where, however, the instrument is founded upon a consideration legal in itself, but intended by one party to further an illegal purpose, and the other party knows of it, but takes no part in this illegal purpose, the law is much more difficult of interpretation. It is the opinion of writers⁹⁹ and courts¹ of great authority that no recovery can be had by a party whose rights are thus tainted with his knowledge of its illegal purpose. But with all deference to the opinions of such distinguished jurists it is submitted that they are not founded upon the better reason. This would seem to be that as long as the transaction is a fair and honest one between the two parties before the court, and one which they had a perfect right to enter into, the subsequent illegal acts of one of them should not invalidate the contract, as to the other, although that other knew of them, unless he, too, directly

⁹⁶ Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Tyler v. Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; Ruckman v. Bryan, 3 Denio (N. Y.) 340; Cutler v. Welsh, 43 N. H. 497; Wright v. Crabb, 78 Ind. 487.

⁹⁷ Pixley v. Boynton, 79 Ill. 351; Quirk v. Thomas, 6 Mich. 76.

⁹⁸ Pol. Cont. 322; Anson, Cont. 192; Favor v. Philbrick, 7 N. H. 326.

⁹⁹ Daniel, Neg. Inst. § 200.

¹ Hubbell v. Flint, 13 Gray (Mass.) 277; Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439; Tatum v. Kelley, 25 Ark. 209, 94 Am. Dec. 717; Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446.

or indirectly, participated in them. Wrongful intent is not punishable by law when nothing is done to carry that intent into effect, and much less bare knowledge of such an intent, without any participation in it. The subsequent acts of the other party are something with which he has no concern.³ And the true rule would seem to be that, unless there was evidence of some act of the party prosecuting the instrument showing that he was a particeps criminis to the illegal acts of the other, the bare knowledge of the holder of the other's intention to perpetrate some illegal act would not be a defense to the instrument as against him.

Same—As Against Bona Fide Holder

A consideration illegal because it is evil or immoral or against public policy is not a ground of defense to an action brought by a purchaser of the instrument for value and without notice. The reasons we have already given in this section as those which have governed courts in dealing with considerations made illegal by statute prevail in these cases also. It is therefore needless to repeat them.⁴

116. DISCHARGE OF THE INSTRUMENT—A negotiable instrument may be discharged by payment, or by act of the holder, or by operation of law.

117. When the instrument has been discharged, it ceases to be negotiable.⁴

"Discharge" of an instrument means the extinguishment of all rights of action thereon. Discharge is usually effected by payment by the principal debtor at maturity, by the principal debtor becoming the holder at maturity, by re-

³ Kreiss v. Seligman, 8 Barb. (N. Y.) 439; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Falkney v. Reynous, 4 Burrows, 2069; Holman v. Johnson, Cowp. 341; Pellecat v. Angell, 2 Cromp., M. & R. 311. See Tiffany, Sales, pp. 134-136.

⁴ Tied. Com. Paper, § 178; Rand. Com. Paper, § 1887; Daniel, Neg. Inst. § 198; Edw. Bills & N. § 516.

⁴ N. I. L. § 47, provides: "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise."

nunciation or release by the holder at maturity, and by cancellation.⁵ It may also be discharged by alteration.⁶ In some cases, though rarely, the instrument is discharged by operation of law. Discharge of the instrument must be distinguished from discharge of a party thereto.

118. PAYMENT—A bill or note is discharged by payment at or after maturity by or on behalf of the acceptor or maker to the holder, in good faith and without notice that the title of such holder is defective.

Payment

Payment in due course⁷ by the principal debtor—that is, by the acceptor or maker—discharges the instrument, because it is a performance of the contract according to its terms by the person primarily liable.⁸ Payment by a co-

⁵ See N. I. L. §§ 119, 125. Professor Ames says that, if title has vested in the payee, "nothing short of a physical destruction, cancellation, or alteration of the instrument, or its retransfer to the acceptor or maker (or the drawer or drawee, if the bill was not accepted), can afterwards extinguish it." 2 Ames Cas. Bills & N. 821. This has reference to extinguishment at law, as distinguished from equity. Yet although the instrument be not retransferred, and hence is not extinguished at law, any transferee after maturity acquires the legal title subject to equities of the acceptor or maker acquired by him at or after maturity, and hence the acceptor or maker is for all practical purposes in the same position as if the instrument were extinguished at law. See 2 Ames Cas. Bills & N. 824. This distinction between extinguishment at law and in equity is not generally taken in the cases or the text-books, and the rule is broadly stated that payment or renunciation at or after maturity, with or without retransfer, discharges the instrument. See Comstock v. Buckley, 141 Wis. 228, 124 N. W. 414, 135 Am. St. Rep. 34 (N. I. L.); Poess v. Twelfth Ward Bank of City of New York, 48 Misc. Rep. 45, 86 N. Y. Supp. 857 (N. I. L.); State Bank v. Kahn, 49 Misc. Rep. 500, 98 N. Y. Supp. 858 (N. I. L.).

⁶ Ante, p. 318.

⁷ N. I. L. § 119, provides: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor." But see Royal Bank of New York v. Goldschmidt, 51 Misc. Rep. 622, 101 N. Y. Supp. 101 (N. I. L.).

⁸ Elsam v. Denny, 15 C. B. 87; Bartrum v. Caddy, 8 Law J. Q. B. 31; Ballard v. Inhabitants of Greenbush, 24 Me. 336; Suydam v.

maker or co-acceptor has the same effect.⁹ Payment by an accommodated party, although he be drawer or indorser, is also in effect a discharge, because, as between himself and the accommodation acceptor or maker, he is primarily

Westfall, 2 Denio (N. Y.) 205; Gordon v. Wansey, 21 Cal. 77; Gardner v. Maynard, 7 Allen (Mass.) 456, 83 Am. Dec. 699. On this, see Swope v. Ross, 40 Pa. 186, 80 Am. Dec. 567, which holds that, since the acceptor of a bill is really the debtor, the drawer and indorser being merely sureties, the debt is extinguished by its payment by the acceptor; and, save where the acceptance was *supra* protest, no right of action remains against such drawer or indorser. See N. I. L. § 119. See p. 393, note 5, *supra*. Where something other than performance is accepted in payment at or after maturity, this establishes a good defense against future holders. McGuinness v. Kyle, 208 Mass. 443, 94 N. E. 700 (N. I. L.); Sussex Nat. Bank v. Seaford (Del. Super.) 89 Atl. 134; Autrey v. Collins (Tex. Civ. App.) 161 S. W. 413; Sellitto v. Lamberti Construction Co. (Sup.) 146 N. Y. Supp. 178 (N. I. L.); Grubbe v. Lahay (Wis.) 145 N. W. 207 (N. I. L.); Rahe v. Yett (Tex. Civ. App.) 164 S. W. 30. Of course, if a new obligation is taken only in conditional payment, the equitable defense is only a temporary one, and so the former instrument is not even in effect discharged. See Barron v. Robinson, 67 Wash. 656, 122 Pac. 343 (N. I. L.); Merchants' Bank v. Bentel (Cal.) 137 Pac. 25; Roberts v. Vonnegut (Ind. App.) 104 N. E. 321, 326; Barton Lbr. Co. v. Gibson (Mo. App.) 161 S. W. 357 (N. I. L.). The reason why the drawer or indorser is not liable if the instrument is paid at maturity is that a condition precedent to the liability of the drawer or indorser has not occurred, not that the instrument was discharged by payment. See Aurora State Bank v. Hayes-Eames Elevator Co., 88 Neb. 187, 129 N. W. 279 (N. I. L.); Balsam v. Mutual Alliance Trust Co., 74 Misc. Rep. 465, 132 N. Y. Supp. 325 (N. I. L.). See Security Sav. & T. Co. v. King (Or.) 138 Pac. 465 (N. I. L.). If the instrument is paid after maturity to the holder by the primary obligor, the reason the drawer or indorser has a defense, although his liability had been fixed by presentment and notice, is that his remedy on the instrument against a prior party has been impaired by the holder. See p. 406 et seq. *infra*. For this same reason payment after maturity by a prior indorser discharges the subsequent indorser as to the holder who receives such payment and his transferees. Thus where the surety on the appeal bond of persons against whom judgments had been recovered as maker and indorsers prior to the last indorser paid the judgment against them, the holder's claim against the last indorser (against whom judgment had not been recovered) was extinguished. State

⁹ Härmer v. Steele, 4 Exch. 1; Cox v. Hodge, 7 Blackf. (Ind.) 146; Swem v. Newell, 19 Colo. 397, 35 Pac. 734.

liable.¹⁰ Payment by the accommodation acceptor or maker also discharges the instrument,¹¹ although the acceptor or maker paying under such circumstances could compel the accommodated party to refund the amount paid. Likewise the instrument is discharged if, when it matures, the acceptor or maker is or becomes the holder,¹² since the right and liability are coincident in one and the same person. In all such cases payment is a defense, even as against subsequent purchasers without notice, for any purchaser thereafter would necessarily acquire the instrument after maturity, and hence subject to defenses.¹³ In order that

Bank v. Kahn, 49 Misc. Rep. 500, 98 N. Y. Supp. 858 (N. I. L.). But a payment made by an insolvent maker corporation in illegal preference of its creditor, the holder of the note, does not discharge an indorser whose liability was previously fixed. *Perry v. Van Norden Trust Co.*, 118 App. Div. 288, 103 N. Y. Supp. 543 (N. I. L.); *Wright v. Gansevoort Bank*, 118 App. Div. 281, 103 N. Y. Supp. 548 (N. I. L.). As to the discharge by payment of a bill drawn in a set, see *Caras v. Thalmann*, 138 App. Div. 297, 123 N. Y. Supp. 97 (N. I. L.); N. I. L. §§ 178, 183. The burden of proving payment or accord and satisfaction is on the party setting up such defense. *Winfrey v. Matthews*, 174 Mo. App. 713, 161 S. W. 583 (N. I. L.).

¹⁰ *Cook v. Lister*, 32 Law J. C. P. 127; *Lazarus v. Cowie*, 3 Q. B. 459; *Woods v. Woods*, 127 Mass. 141; *BLENN v. LYFORD*, 70 Me. 149, Moore Cases Bills and Notes, 194; N. I. L. § 119-2; *Lamberson v. Love*, 165 Mich. 460, 130 N. W. 1126 (N. I. L.).

¹¹ *Harmer v. Steele*, 4 Exch. 1; *Bartrum v. Caddy*, 9 Adol. & E. 275.

¹² *Harmer v. Steele*, 4 Exch. 1; *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29); *Chalm. Bills & N. art.* 238. N. I. L. § 119, provides, "A negotiable instrument is discharged: * * * (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right." If such primary obligor acquires possession under such circumstances that he is under an equitable obligation to redeliver the instrument, a recovery is allowed against him on the ground that the instrument has not been discharged. *Korkemas v. Macksoud*, 131 App. Div. 728, 116 N. Y. Supp. 85 (N. I. L.); *People's Bank v. Dryden*, 91 Kan. 216, 137 Pac. 928 (N. I. L.); *Morris v. Reyman* (Ind. App.) 103 N. E. 423; *Re Metallic Specialty Mfg. Co.* (D. C.) 210 Fed. 663 (N. I. L.). See *Proebstel v. Trout*, 60 Or. 145, 118 Pac. 551 (N. I. L.); *Greer v. Orchard*, 175 Mo. App. 494, 161 S. W. 875 (N. I. L.).

¹³ *Garden v. Maynard*, 7 Allen (Mass.) 456, 83 Am. Dec. 699; *Hagin v. Shoaf* (Ala. App.) 63 South. 764; *Brown v. Bay City Bnk. & T. Co.* (Tex. Civ. App.) 161 S. W. 23; *ante*, p. 271.

payment or coincidence of right and liability should operate as a discharge, it is essential that the instrument should have matured; for an acceptor or maker may acquire it before maturity, as purchaser, and may then further negotiate it.¹⁴ Moreover, although the acceptor or maker intends the transaction to take effect as payment and discharge, such payment would be no defense against a purchaser for value without notice; as in case the acceptor, after paying the money to the holder, had allowed him to retain the instrument, and he had negotiated it; or in case the acceptor, after thus taking up a bill payable to bearer, had, before it matured, lost it, and it had come into the hands of an innocent purchaser.¹⁵ It is to be observed that an acceptor or maker purchasing before maturity is not a purchaser in due course; and, therefore, although the paper be transferable by delivery, he acquires only the title of

¹⁴ Attenborough v. Mackenzie, 25 Law J. Exch. 244; Swope v. Ross, 40 Pa. 186, 80 Am. Dec. 567; Mishler v. Reed, 76 Pa. 76.

¹⁵ Scott v. Taylor, 63 Fla. 612, 58 South. 30 (N. I. L.); Snead v. Barclift, 2 Ala. App. 297, 56 South. 592 (N. I. L.); Vance v. Bryan, 158 N. C. 502, 74 S. E. 459 (N. I. L.); BURBRIDGE v. MANNERS, 3 Camp. 193, Moore Cases Bills and Notes, 190. It was held in the case last cited that, although a bill cannot be reissued after it has arrived at maturity and been paid, yet if paid, and afterwards indorsed before it becomes due, it is a valid security in the hands of a bona fide indorsee. In the case of Morley v. Culverwell, 7 Mees. & W. 174, it was shown that the drawer of a bill of exchange, before it became due, agreed with the acceptor that, on his giving a certain mortgage security for the amount, he, the drawer, would deliver the bill up to him, and the acceptor accordingly executed the mortgage and received back the bill uncancelled. It was held that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value before it came due; and that the plea that the bill was paid by the acceptor before it came due, and afterwards reissued by him without a new stamp, could be supported only by proof of actual payment at maturity in cash, and not by evidence of an arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied. See Wheeler v. Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231. Section 119, N. I. L., provides: "A negotiable instrument is discharged: * * * (4) By any other act which will discharge a simple contract for the payment of money." See comments on this subsection, Brannan, Anno. N. I. L. (2d Ed.) p. 118.

his transferrer, and hence, unlike an ordinary purchaser, he could not acquire title from a finder or a thief.¹⁶ Again, in order that payment should operate as a discharge, it must be made to the holder,¹⁷ and in good faith.¹⁸ The acceptor

¹⁶ *De Silva v. Fuller*, 1 Chit. Bills, p. 392; 2 Ames Cas. Bills & N. 823.

¹⁷ Or to some one who is actually or apparently authorized by him to receive payment. *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643 (N. I. L.); *Griswold, Hallette & Persons v. Davis*, 125 Tenn. 223, 141 S. W. 205 (N. I. L.); *New England Nat. Bank of Kansas City, Mo., v. Dick*, 84 Kan. 252, 114 Pac. 378 (N. I. L.); *Dibble v. Law (Ga.)* 80 S. E. 899; *Park v. Parker*, 216 Mass. 405, 103 N. E. 936 (N. I. L.). A provision in a note making it payable at a particular bank does not make the bank agent of the payee to receive the money. *Kelsay v. Taylor*, 56 Or. 13, 107 Pac. 609 (N. I. L.).

¹⁸ *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693 (N. I. L.), and authorities cited. In that case the maker bank before payment to the indorsee, to whom the instrument had been transferred by the payee in payment of a gambling debt, was notified by the payee not to pay the instrument. This conclusion would seem sustainable at least on authority if the instrument had been obtained from the payee by the fraud of the indorsee, since the payee would then be the cestui of a constructive trust, having a right to affirmative relief in a court of equity against the indorsee. But where the indorsement is merely in the course of an illegal transaction the indorsee would not be compelled to deliver up the instrument at the suit of the payee. Therefore no arrangement between the payee and the maker should affect the right of the indorsee to recover on the instrument. But in *Stewart v. Bibb County Banking & Trust Co. (Ala.)* 58 South. 273, the majority of the court went so far as to hold that in an action on a note it was a good plea that they were transferred by the payee to the plaintiff as collateral to a usurious debt and that before this suit was begun the defendant paid the notes to the payee without knowing that they had been transferred. Dowdell, C. J., writing the opinion for the court, but dissenting, said: "The defense of payment attempted to be set up was not an existing one between the original parties to the notes prior to or at the time of the transfer of the notes to the plaintiff, but was one of the defendant's own creation, and through his own neglect in failing to make payment at the time and place designated in the notes, and in the performance of this primary duty that rested upon him he would have saved himself from that of which he now complains. Under this state of facts we are unable to see how the fact of usury in the debt of the payee for which the notes sued on were given as collat-

or maker must occupy, in this respect, substantially the position of a purchaser for value without notice. If paper be transferable by indorsement, payment can be made only to the payee named, or to one holding under his indorsement.¹⁹ Payment under a forged indorsement, for example, would be no discharge.²⁰ But, if the paper be transferable by delivery, payment in good faith to the bearer would be a discharge, whatever the infirmity of his title.²¹

Payment by one secondarily liable, on the other hand,

eral security could be of any avail to the maker of these notes. As to already existing equities and defenses between the original parties, usury in the debt for which the notes sued on were transferred as collateral to secure might well take from the transferee the protection afforded a bona fide holder for value; * * * but such is not the case here." The wording of some of the sections of the N. I. L. suggests the view taken in *Drinkall v. Movius State Bank*, supra, and also the view taken in *Parsons v. Utica Cement Co.*, 82 Conn. 333, 73 Atl. 785, 135 Am. St. Rep. 278, that where the transferee obtains the instrument by fraud from the payee, this is a defense in an action by such transferee against the maker, and therefore that a payment by the maker to such transferee with knowledge of such fraud is not a defense in an action by the payee. Section 88, N. I. L., provides: "Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective." Section 55, N. I. L., provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he has obtained the instrument, or any signature thereto, by fraud, duress, or force, and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in a breach of faith, or under such circumstances as amount to a fraud." Section 51, N. I. L., provides: "The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." Section 119, N. I. L., provides: "A negotiable instrument is discharged: (1) By payment in due course on or behalf of the principal debtor." See *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331 (N. I. L.). But see *Prouty v. Roberts*, 6 Cush. (Mass.) 19, 52 Am. Dec. 761; *Kinney v. Kruse*, 28 Wis. 183.

¹⁹ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502.

²⁰ *Smith v. Shepard*, Chitty, Bills (10th Ed.) 180, note.

²¹ *Anonymous*, Style, 366; *Eastman v. Plumer*, 32 N. H. 238; *Bank of United States v. United States*, 2 How. 711, 11 L. Ed. 439; *Greve v. Schweitzer*, 36 Wis. 554; *Chappelear v. Martin*, 45 Ohio St. 132, 12 N. E. 448; *Stoddard v. Burton*, 41 Iowa, 582.

although at or after maturity, is not a discharge of the instrument. The drawer and indorser are liable to subsequent parties, but prior parties are liable to them. Payment by the drawer or indorser, therefore, unless he be an accommodated party, does not discharge the instrument, but operates as against prior parties by way of purchase.²² The drawer or indorser is remitted to his former position, and may enforce the instrument against prior parties, or he may again indorse and transfer it; with this exception, however, so far as concerns the drawer: that, if the instrument be payable to the order of a third person, the drawer cannot, of course, upon making payment, again indorse and transfer.²³ Payment by the drawer or indorser does not inure to the benefit of the acceptor or maker; and, therefore, if the drawer or indorser pays to the holder part of the amount due, or even the whole amount, and the holder retains possession of the instrument, he may recover from the acceptor or maker the whole amount. He would then hold the amount recovered as trustee for the drawer or acceptor, or as trustee pro tanto in case partial payment had been made by them.²⁴

²² As to indorser, *West Boston Sav. Bank v. Thompson*, 124 Mass. 506; *Howe Mach. Co. v. Hadden*, 8 Biss. 208, Fed. Cas. No. 6,785; *Hayling v. Mulhall*, 2 W. Bl. 1235; *Morgan v. Reintzel*, 7 Cranch, 273, 3 L. Ed. 340. As to drawer, *Callow v. Lawrence*, 3 Maule & S. 95; *Benj. Chalm. art. 234*; *Story, Bills*, § 422; *Rand. Com. Paper*, § 427. In *Callow v. Lawrence*, *supra*, the drawer of a bill payable to his own order, and indorsed by him to T., and by T. to B., upon the bill being dishonored, paid the amount to B., who struck out his own and T.'s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff. It was held that the plaintiff might recover against the acceptor. *N. I. L.* § 121; *Twelfth Ward Bank of City of New York v. Brooks*, 63 App. Div. 220, 71 N. Y. Supp. 388 (*N. I. L.*). But see *PRICE v. SHARP*, 24 N. C. 417, *Moore Cases Bills and Notes*, 196; *State Bank v. Kahn*, 49 Misc. Rep. 500, 98 N. Y. Supp. 858 (*N. I. L.*); *Miller v. Del River Min. Co.* (*Idaho*) 136 Pac. 448.

²³ *Beck v. Robley*, 1 H. Bl. 89, note; *Gardner v. Maynard*, 7 Allen (*Mass.*) 599, 83 Am. Dec. 699; *N. I. L.* § 121.

²⁴ *Jones v. Broadhurst*, 9 C. B. 173; *Madison Square Bank v. Pierce*, 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. Rep. 751. But see *Royal Bank of New York v. Goldschmidt*, 51 Misc. Rep.

It is well, perhaps, to append to this statement a few scattered principles usually added by the text writers to their remarks upon this branch of the subject. It is advisable for any party making payment to assure himself that there has been due presentment, protest, and notice, because in default of these he could not recover against the antecedent indorsers or the drawer under liability to him. It is also advisable for him to look to the identity of the holder, and that he traces a legal title to the instrument. And lastly that he take the instrument itself into his possession, because that is *prima facie* evidence of payment, and also that he strengthen this evidence by taking a separate voucher as a receipt.²⁵ This last course is especially desirable in case of an indorser making payment, because, in his action against prior parties, possession of the instrument is in some cases not sufficient evidence of its payment by him, and it is necessary for him to show the fact of payment by himself affirmatively. For this purpose a receipt, while not conclusive, is yet very strong proof.²⁶ The person to whom payment must be made is the legal holder or his duly authorized agent.²⁷ This legal ownership depends upon two principles. If the instrument is payable to bearer or indorsed in blank, its possession is presumptive evidence of right to collect it.²⁸ But if it is made payable to order or indorsed to order, the order of the payee is necessary to confer title and right to collect, and mere possession is not presumptive evidence of title.²⁹ In such cases, where it is lawfully in the holder's possession, there must be shown, in addition, some evidence of agency or legal right to receive

622, 101 N. Y. Supp. 101 (N. I. L.). See *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671 (N. I. L.).

²⁵ Daniel, Neg. Inst. c. 38, § 2; Tied. Com. Paper, c. 19, §§ 372, 373.

²⁶ *Mendez v. Carreroon*, 1 Ld. Raym. 742.

²⁷ See p. 397, note 17, *supra*.

²⁸ *MAURAN v. LAMB*, 7 Cow. (N. Y.) 174, *Moore Cases Bills and Notes*, 148; *Merritt v. Cole*, 14 Hun (N. Y.) 324; *Bachelor v. Priest*, 12 Pick. (Mass.) 406; *Bank of United States v. United States*, 2 How. 711, 11 L. Ed. 439. See *infra*, p. 486.

²⁹ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Porter v. Cushman*, 19 Ill. 572; *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58. See *infra*, p. 485.

the money, as that the holder is the assignee of a bankrupt, or the representative of the dead owner, or the guardian of an infant.³⁰ The subject of payment by negotiable instrument has already been discussed.³¹

Same—Payment or Purchase

The question sometimes arises whether a transaction amounts to a payment and discharge or to a purchase. For example, while payment in due course by the principal debtor necessarily discharges the instrument, he might pay over the money as agent for another, who intended to become a purchaser of the instrument; and, if the instrument were indorsed to such purchaser, or if, being payable to bearer, it were delivered to the person paying over the money as agent for the purchaser, the transaction would take effect as a purchase. Whether such a transaction is a payment or a purchase depends upon the intention of the parties. In the case supposed, if the instrument were transferable by delivery, it might have been the intention of the holder simply to receive payment, and to deliver up the instrument to the person discharging it, or it might have been his intention to make a sale of the instrument. So far as the acts of the parties go, the transaction might take effect either as payment or as purchase. But the seller even of paper transferable by delivery incurs liability by virtue of his implied warranties, and, in order that the transaction may take effect as a sale, there must be evidence, either by his words or his acts, of his intention to sell. In the case supposed, since his acts would not necessarily indicate any intention to assume such liability, the transaction would take effect as payment and discharge.³² So if a stranger pays the amount due to the holder, and he delivers over the instrument, the transaction will take effect

³⁰ Bayley, Bills (2d Am. Ed.) 320; 2 Pars. Notes & B. 211; Daniel, Neg. Inst. § 1230; Tied. Com. Paper, § 374.

³¹ Ante, p. 25.

³² Lancey v. Clark, 64 N. Y. 209, 21 Am. Rep. 604; Burr v. Smith, 21 Barb. (N. Y.) 262; Eastman v. Plumer, 82 N. H. 238; Greening v. Patten, 51 Wis. 150, 8 N. W. 107.

as payment, unless the holder has in some way evidenced his intention to transfer the instrument to the payer as purchaser.⁸³ If the facts are in dispute, the question is for the jury, to be determined according to the intention of the parties as evidenced by their words and acts.⁸⁴

Same—Payment Supra Protest

Ordinarily one who, without request, pays the debt of another, acquires thereby no right of reimbursement against the debtor. By the law merchant, however, an exception exists in the case of what is known as "payment supra protest," or "for honor," introduced in aid of the credit and circulation of bills of exchange, but not extended to promissory notes. Where a bill has been protested for non-payment, any party, whether drawer, drawee, payee, or indorser, and also a mere stranger, may pay it, without request, for the honor of any party or parties. In case of such payment the payor has a right of reimbursement against the party for whose honor he intervenes and against all prior parties.⁸⁵ Subsequent parties are thereby discharged. His position is the same in effect as if he were the indorsee of the person for whose honor he intervened, and had himself paid the bill to the holder. If he pays for honor generally—that is, for the honor of all parties to the bill—he may recover against all parties. If he pays for the honor of the acceptor, he may sue him alone. If he pays for the honor of the drawer, he may sue the drawer and the acceptor. The cases are in conflict, however, as to whether he may in such case recover from an accommodation acceptor. That he may so recover has been finally estab-

⁸³ *Burr v. Smith*, 21 Barb. (N. Y.) 262. Where notes were surrendered by collection bank, uncanceled, to one under no obligation to pay, who stated that he wished to purchase, and not to pay, them, and who gave full value, not knowing that the bank held them for collection, the transaction was a purchase. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762.

⁸⁴ *Kyne v. Erskine*, 7 Mo. App. 591; *Dougherty v. Deeney*, 45 Iowa, 443; *Swope v. Leffingwell*, 72 Mo. 348. See *In re Gamble's Estate*, 91 Neb. 199, 135 N. W. 558.

⁸⁵ *Mertens v. Winnington*, 1 Esp. 113; *In re Overend*, L. R. 6 Eq. 344.

lished in England,⁸⁶ upon the ground that "the person who takes up a bill supra protest for the honor of a particular party succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honor he takes it up, and that he cannot indorse it over."⁸⁷ The contrary doctrine is maintained by Mr. Daniel upon the ground that he succeeds as against parties anterior to the one for whose honor he pays to the rights of that party.⁸⁸ The payment must be preceded or accompanied by a declaration for whose honor he pays, to be made in the presence of a notary public, and the declaration must be recorded by the notary in the protest or in a separate instrument. The payor must also notify the party for whose honor he intervenes.⁸⁹

119. DISCHARGE BY ACT OF HOLDER—The holder

may discharge the instrument by

- (a) Renunciation or release at or after maturity;
- (b) Cancellation.

The holder may waive his right to payment, and if, at or after maturity, he absolutely and unconditionally renounces or releases his right against the acceptor or maker, he thereby discharges the instrument.⁹⁰ A renunciation before

⁸⁶ *In re Overend*, L. R. 6 Eq. 344 (overruling *Ex parte Lambert*, 18 Ves. 179), *Ex parte Wackerbarth*, 5 Ves. 574.

⁸⁷ *In re Overend*, L. R. 6 Eq. 344, per Sir R. Malins, V. C.

⁸⁸ Daniel, Neg. Inst. § 1255. See, also, *McDowell v. Cook*, 14 Miss. (6 Smedes & M.) 420, 45 Am. Dec. 289; *Gazzam v. Armstrong's Ex'r*, 8 Dana (Ky.) 554. It would seem that the English rule is adopted by N. I. L. § 175, but this is perhaps not free from doubt. See Brannan, Anno. N. I. L. (2d Ed.) 147, 148.

⁸⁹ As to payment supra protest, see, generally, Daniel, Neg. Inst. §§ 1254-1258; Rand. Com. Paper, §§ 1194-1197, 1437; N. I. L. §§ 171-177.

⁹⁰ *Foster v. Dawber*, 6 Exch. 839; N. I. L. § 122. An agreement in writing, for valuable consideration by the holder, never to sue the maker, but reserving all rights against the indorser, is not an absolute and unconditional renunciation of rights against the maker.

maturity, like payment before maturity, does not affect the rights of innocent purchasers.⁴¹ The Negotiable Instruments Law provides that a renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.⁴² The requirement that the renunciation must be in writing changes the law, for at common law the renunciation may be by way of gift evidenced in any way.⁴³ So, too, the holder may waive his right to payment by an intentional cancellation of the instrument. If the cancellation be made unintentionally, or under a mistake, it is inoperative; but the burden lies upon the party who alleges that it was unintentional to establish the fact.⁴⁴

and so does not discharge the instrument, and thus the indorser. *Faneuil Hall Nat. Bank v. Meloon*, 183 Mass. 66, 66 N. E. 410, 97 Am. St. Rep. 416 (N. I. L.). A written direction of the holder to cancel the instrument in the event of his death is not an absolute and unconditional renunciation, not being an expression of a present giving up of all rights under the instrument against the principal debtor. *LEASK v. DEW*, 102 App. Div. 529, 92 N. Y. Supp. 891 (N. I. L.), *Moore Cases Bills and Notes*, 200.

⁴¹ *Dod v. Edwards*, 2 Car. & P. 602 (general release); *Morley v. Culverwell*, 7 Mees. & W. 174; N. I. L. § 122.

⁴² Section 122. Under this section it has been held that a parol release is not a defense, although supported by a valuable consideration. *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724 (N. I. L.); *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (N. I. L.). See *Mudd v. Farmers' Bank*, 175 Mo. App. 398, 162 S. W. 314 (N. I. L.).

⁴³ *Foster v. Dawber*, 6 Exch. 839, 20 Law J. Exch. 385, per Willes, J. This is an exception to the common-law rule that simple contracts cannot be discharged after breach except by deed or for consideration. *Byles, Bills* (Wood's Ed.) *199. But many cases have refused to recognize such an exception, holding that the renunciation may be by way of gift, but that to constitute a gift there must be delivery with intention of passing title. *Bragg v. Danielson*, 141 Mass. 195, 4 N. E. 622; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168; *Henderson's Adm'r v. Henderson*, 21 Mo. 379; *Benj. Chalm. Bills & N. art. 239*, and notes; 4 Am. & Eng. Enc. Law (2d Ed.) 503. Of course, renunciation accompanied by surrender is sufficient. *Sherman v. Sherman*, 3 Ind. 337; *Hale v. Rice*, 124 Mass. 292; *Stewart v. Hidden*, 13 Minn. 43 (Gll. 29); *SCHWARTZMAN v. POST* (Sup.) 84 N. Y. Supp. 922 (N. I. L.), *Moore Cases Bills and Notes*, 191; *First Nat. Bank of City of Brooklyn v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.).

⁴⁴ N. I. L. § 123; *McCormick v. Shea*, 50 Misc. Rep. 592, 99 N. Y. Supp. 467 (N. I. L.).

Cancellation may be made by destruction of the instrument,⁴⁵ and it may doubtless be made in any other way that evidences upon the face of the instrument that it is canceled, as by obliteration, writing, stamping, or tearing.⁴⁶ It may be made before maturity; but, in order that it may be a defense in such case against a bona fide purchaser for value, it must be of such a character as to carry notice to him on the face of the instrument.⁴⁷

⁴⁵ *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176.

⁴⁶ N. I. L. § 119 (subd. 3); *Citizen's Nat. Bank of New Castle v. Hileman*, 233 Pa. 432, 82 Atl. 770 (N. I. L.). N. I. L. § 119 (subd. 4), provides: "A negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money." See comments on this subdivision, Brannan, Anno. N. I. L. (2d Ed.) 118, 119.

⁴⁷ In *INGHAM v. PRIMROSE*, 7 C. B. (N. S.) 82, *Moore Cases Bills and Notes*, 203, defendant accepted a bill, and delivered it to M. to get it discounted. M., failing to obtain a discount, returned it to defendant, who, in M.'s presence, tore it in half, with the intention of canceling it, and threw it away in the street. M. picked it up, and afterwards pasted the pieces together, and passed it to a bona fide purchaser, who indorsed it to plaintiff. A verdict was directed for defendant, with leave to plaintiff to move to enter verdict for him, the court to be at liberty to draw inferences of fact. It was held that the bill was good in the hands of a bona fide purchaser, and that it was for the jury whether the bill on its face indicated that it had been canceled; and the court, performing the function of a jury under the rule, found that the purchaser was not so affected with notice by the appearance of the bill. Defendant's treatment of the bill was clearly a cancellation, but it seems that the appearance of the bill was such as to affect him with notice, even if the defense were personal. Cf. *Scholey v. Ramsbottom*, 2 Camp. 485. In *BAXENDALE v. BENNETT*, 3 Q. B. Div. 525, *Moore Cases Bills and Notes*, 184, Brett, B., said that in *INGHAM v. PRIMROSE* the acceptor was held liable "because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me difficult to approve that case, and the correct mode of dealing with it is to say we do not agree with it." If a bill or note were canceled by obliteration or stamping, and the cancellation marks were subsequently fraudulently erased, so that the question of notice from the face of the instrument did not arise, it is clear that the defense of cancellation would be good against a bona fide purchaser. *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. 694. The Eng-

Discharge by Operation of Law

The instrument is discharged in certain cases by operation of law, irrespective of the intention of the parties.⁴⁸ For example, when the holder appoints the acceptor or maker his executor, though this common-law rule is generally abolished by statute;⁴⁹ or where the payee of a note, being a woman, intermarries with the maker, the note is discharged, and cannot be revived by the husband's death;⁵⁰ and where a note made by a single woman, who afterwards marries, is transferred to her husband, the note is discharged, and cannot be revived by a retransfer by the husband to the payee.⁵¹ These rules are doubtless affected in many states by legislation concerning the property rights of married women. Other instances of discharge commonly cited are discharge of the debtor by an insolvent or bankruptcy act, and merger of the right of action against a party to the instrument in a judgment against him. These discharges, however, are not discharges of the instrument. Nor does the discharge of a bankrupt release a party secondarily liable.⁵²

120-121. DISCHARGE OF PARTIES SECONDARILY LIABLE—Where the holder of a negotiable instrument does any act which will impair any right of the drawer or of any indorser against other parties to the instrument liable to him, it operates as a discharge of the obligation of the drawer or indorser. This does not apply if, subsequent to such discharge, a purchaser for value without notice before maturity acquires the instrument.

lish Bills of Exchange Act provides (section 63): "Where a bill is intentionally canceled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged."

⁴⁸ *Freakley v. Fox*, 9 Barn. & C. 130.

⁴⁹ *Daniel, Neg. Inst.* §§ 1283, 1285.

⁵⁰ *Abbott v. Winchester*, 105 Mass. 115.

⁵¹ *Chapman v. Kellogg*, 102 Mass. 246.

⁵² See N. I. L. § 120 (subd. 3) and summary of comments on that subdivision in Brannan, Anno. N. I. L. (2d Ed.) 119-121.

In addition to the methods of discharge extinguishing the instrument itself as an obligation must be mentioned the methods of discharge extinguishing the several contracts of the drawer and indorsers in their character of a surety thereupon by operation of the general rule of suretyship applied to the law of negotiable bills and notes.⁶⁸

⁶⁸ See N. I. L. § 120. This section applies only to parties secondarily liable on the instrument. Frequently, however, persons make themselves primarily liable on negotiable instruments as sureties for other parties. In *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129 (N. I. L.), the action was by the holder against the makers of a promissory note. This defendant pleaded that he signed as surety to the knowledge of the plaintiff and that the plaintiff had, after such knowledge, made a promise to the principal debtor, for valuable consideration, to extend the time for payment. It was held that a demurrer to this plea was properly sustained on the ground that the methods of discharge named in section 119, N. I. L., were the only methods, under that act, of discharging a party primarily liable on a negotiable instrument. Accord: *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997 (N. I. L.); *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882 (N. I. L.), semble; *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 28 L. R. A. (N. S.) 99 (N. I. L.); *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 320 (N. I. L.); *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127 (N. I. L.); *National Citizens' Bank of City of New York v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422 (N. I. L.), affirmed 178 N. Y. 464, 71 N. E. 1. Contra: *Fulerton Lumber Co. v. Snouffer*, 139 Iowa, 176, 117 N. W. 50 (N. I. L.). In this case the action was by the payee against the makers of a negotiable promissory note. The trial court directed a verdict for the plaintiff against both defendants in spite of evidence of a binding extension of time given by the plaintiff to the principal maker with knowledge that the other maker was a surety. This was held error, the appellate court saying that, although a holder in due course would not have been subject to this defense, it was a good defense between the defendant surety and the plaintiff in this action. With reference to *Vanderford v. Farmers' & Mechanics' Nat. Bank*, *supra*, and the cases in accord with it, Brannan, *Anno. N. I. L. (2d Ed.)* 117, makes the following comment: "It is submitted that the decisions in these cases are at variance with well established doctrines of suretyship (see *infra*, p. 176, note 2), and are not required by the provisions of sections 119 and 120. The discharge of a party, who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor seems to be covered by section 119 (subd. 4).

The principle underlying this method is that if the holder of a bill or note does any act which will impair any right of the drawer or indorsers against other parties to the instrument liable to him, the drawer or indorser will be discharged. The reason for this rule is the promise implied in law, that, if either the drawer or indorser pays the instrument, parties liable to him will reimburse him for such payment, and that to effect such end upon payment the drawer or indorser is entitled to demand its possession from the creditor, and to be subrogated to all remedies possessed by him against the prior parties thereon, unimpaired by any act of such creditor—a promise which the creditor also impliedly ratifies in making his contract with the indorser.⁵⁴ If the creditor violates any part of this contract, this violation releases the indorser. From this principle flow several principles which are of very common application. They are as follows:

- (1) Whatever discharges the acceptor or maker discharges the drawer or indorsers, because the ultimate rem-

But if this is not so, then, since the discharge of a surety maker, or a surety acceptor, by an extension of time granted to the principal by a holder without knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this must be regarded as an omitted case, and therefore be governed by the law merchant under section 196."

⁵⁴ Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; Goodyear v. Watson, 14 Barb. (N. Y.) 481; Clason v. Morris, 10 Johns. (N. Y.) 524. A valid tender, like payment, discharges parties secondarily liable. Spurgeon v. Smitha, 114 Ind. 453, 17 N. E. 105; Joslyn v. Eastman, 46 Vt. 258; N. I. L. § 120. A release of the principal debtor with an express reservation of the holder's right of recourse against the party secondarily liable does not discharge the latter, his rights against the principal debtor being reserved by implication. Stewart v. Eden, 2 Caines (N. Y.) 121, 2 Am. Dec. 222; Rockville Nat. Bank v. Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; Daniel, Neg. Inst. § 1310; N. I. L. § 120 (subd. 5). Thus where new notes maturing later than an old note are accepted in conditional payment of the latter, and the old note was held as collateral for the expressly stated purpose of retaining the liability of the defendant as indorser on the old note, it was held that the defendant was not discharged. The reservation of rights against the surety is impliedly a reservation of rights against the maker for the benefit of the surety. National Park Bank v. Koehler, 65 Misc. Rep.

ties of the drawer or indorsers are against these parties, and releasing them extinguishes the obligation which in turn they, as sureties, undertook should be performed.⁵⁵

(2) Any act of the holder which discharges a prior indorser discharges subsequent ones, because such prior indorser guaranteed subsequent indorsers that he would pay if the maker or acceptor did not. As far as they were concerned, he stood in the position of a principal upon the contract, and the release of their principal also releases them. A discharge of a prior indorser therefore is like a discharge of the maker or acceptor, and the holder violates this contract with them.⁵⁶

(3) If the holder releases securities held by him as collateral to claims against parties against whom the indorser would have recourse, it releases the indorser pro tanto. This is because the surety, upon payment of the claim against his principal, has a right to be put in the place of the creditor. He has a right to enforce every means of payment against the principal debtor the creditor had. These securities were a means of such enforcement, and he has a right to them. Every remedy the creditor had, upon payment by the surety, belongs to him. And if the creditor impairs the rights of the surety in this respect, he breaks his contract with him and releases him.⁵⁷

390, 121 N. Y. Supp. 640 (N. I. L.), judgment affirmed 137 App. Div. 785, 122 N. Y. Supp. 490.

⁵⁵ *Sargent v. Appleton*, 6 Mass. 85, 4 Am. Dec. 90; *Couch v. Waring*, 9 Conn. 261; *Gunnis v. Weigley*, 114 Pa. 194, 6 Atl. 465; N. I. L. § 120 (subds. 1 and 3).

⁵⁶ *Newcomb v. Raynor*, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219. In this case it was held by Nelson, C. J., that, "as between the first and subsequent indorsers, the former must be regarded in the light of principal. He stands behind them upon the paper, and is bound to take it up, in case of default of the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties), on general principles, operates to release them." *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 281. See pp. 394, 399, notes 8 and 22, supra. N. I. L. § 120 (subd. 3), provides: "A person secondarily liable on the instrument is discharged: By the discharge of a prior party." See criticism of this subdivision summarized in Brannan, Anno. N. I. L. (2d Ed.) 120, 121.

⁵⁷ *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Clason v. Morris*,

(4) Where the holder of the instrument upon a valid consideration makes a definite promise to extend the time or forbear suit against a party liable to a drawer or indorser, this discharges the drawer or indorser.⁵⁸ The reasons for this rule are that it creates a contract different from the one the surety guaranteed, and that it prevents the surety from protecting himself by paying forthwith the principal's debt and immediately bringing suit against him.⁵⁹ But it must be a new contract which is created and

10 Johns. (N. Y.) 530; Craythorne v. Swinburne, 14 Ves. 169; Mathews v. Alkin, 1 N. Y. 595. Section 1879—1, subd. 4a, Wis. St. 1911, provides: "A person secondarily liable on the instrument is discharged: * * * (4a). By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands, or within his control, the means of complete or partial satisfaction, the same are applied to other purposes." In State Bank of La Crosse v. Michel, 152 Wis. 88, 91, 139 N. W. 748, 749 (N. I. L.), it was held that, under this section, a misapplication of securities by the creditor gave the indorser only a defense *pro tanto*. The court, through Winslow, J., said: "The purpose of the law * * * was to secure uniformity by wiping out small differences, not to change the general principles of commercial law." Where, with knowledge of the release of securities by the holder, the indorser indorses renewal note to the same holder, such release of securities is not an equitable defense to such indorser of the renewal note against such holder. Lynch v. O'Brien (Va.) 79 S. E. 389 (N. I. L.).

⁵⁸ N. I. L. § 120 (subd. 6); Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847 (N. I. L.); Northern State Bank of Grand Forks v. Bellamy, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149 (N. I. L.).

⁵⁹ Siebenecck v. Anchor Sav. Bank, 111 Pa. 187, 2 Atl. 485; Batavian Bank v. McDonald, 77 Wis. 486, 46 N. W. 902; Stevens v. Oaks, 58 Mich. 343, 25 N. W. 309; English v. Darley, 2 Bos. & P. 61. In the case of Okle v. Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251, the holder of a note took a check from the maker, dated six days subsequent to the maturity of the note, and with the understanding that the check was to be in full satisfaction of such note, if paid. It was held that this constituted an extension to the maker, and discharged an indorser. In the case of Tierman v. Woodruff, 5 McLean, 350, Fed. Cas. No. 14,028, a bankrupt obtained for a valuable consideration, from a creditor, two months' time, during which the creditor's right to bring suit was suspended. It was claimed by the indorser that this operated to discharge him from his indorsement, but it was held that since, by the bankrupt law, the bankrupt was

substituted for the old one. It must be with the principal himself,⁶⁰ and must have a valid consideration.⁶¹ It must be absolute,⁶² and not indefinite.⁶³ And it must have all

discharged of all liability, and since the sole remedy of the indorser lay in his presentation of his future liability against the bankrupt's estate, his right was not prejudiced by the extension of time, and there was no discharge. In *Laxton v. Peat*, 2 Camp. 185, it was held that if the indorsee of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer, and give him time to pay the residue, he thereby discharges the acceptor. In the case of *Pannell v. McMechen*, 4 Har. & J. (Md.) 474, "the drawer and indorser of a note, being unable to meet their engagements, proposed to compound with their creditors, and executed a deed of trust to trustees, of whom the defendant was one, to be applied to the payment of debts in the order directed, thereby securing to the defendant the payment of the note in question, on the terms that such creditors as should become parties to the deed should have an interest in the property conveyed. The deed contained a clause releasing the drawer and first indorser, on the express terms that the release should extend to no other terms. The plaintiff and defendant assented, and signed the instrument. * * * Therefore * * * the court are clearly of the opinion that the release in this case cannot discharge the defendant." (Per Johnson, J.) In *Callott v. Haigh*, 3 Camp. 281, it was held that the drawer of an accommodation bill was not discharged by time being given the acceptor, and in *Fentum v. Pocock*, 5 Taunt. 192, it was held that, if the holder of a bill accepted for the accommodation of the drawer takes a cognovit from the drawer for payment by installments, he does not thereby discharge the acceptor, whether the holder knew at the time of taking the bill that it was an accommodation bill or not. As to the effect of release, where the paper was made or accepted for accommodation, see Daniel, Neg. Inst. §§ 1332a-1338a; Benj. Chalm. Bills & N. p. 259.

⁶⁰ *Harbert v. Dumont*, 3 Ind. 346.

⁶¹ *McLemore v. Powell*, 12 Wheat. 554, 6 L. Ed. 726. It was held by Justice Story, in this case, that: "The case then resolves itself into this question,—whether a mere agreement with the drawers for a delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself, and we are all of opinion that it does not. * * * In order to produce such a result, the agreement must be one binding in law upon the parties, and have sufficient consideration to support it." *Davis v. Graham*, 29 Iowa, 514; *Galbraith v. Fullerton*, 53 Ill. 128.

⁶² *Harnsberger's Ex'r v. Geiger's Adm'r*, 3 Grat. (Va.) 144.

⁶³ *Gardner v. Watson*, 18 Ill. 347; *Blackstone Bank v. Hill*, 10

other requisites necessary to create a contract. The surety must not assent to it,⁶⁴ and it must be without reservation as to him.⁶⁵ It is to be added, by way of caution, that this rule must not be understood to mean mere delay,⁶⁶ nor part payment,⁶⁷ nor the receipt by the creditor of collateral security to protect his claim.⁶⁸ For these in no wise prejudice the surety in his position.

SUMMARY OF DEFENSES

Real Defenses

(1) Incapacity to contract: (a) infancy; (b) coverture, in some jurisdictions; (c) insanity; (d) intoxication; (e) corporate incapacity.

(2) Illegality, when the contract is declared void by statute.

(3) The discharge of the instrument by (a) alteration; (b) cancellation; (c) payment, or renunciation or release, at or after maturity.

Pick, (Mass.) 133; Abel v. Alexander, 45 Ind. 523, 15 Am. Rep. 270; People's Bank of Wilkes-Barre v. Legrand, 103 Pa. 309, 49 Am. Rep. 126; Beach v. Zimmerman, 106 Ind. 498, 7 N. E. 237.

⁶⁴ President, etc., of Gloucester Bank v. Worcester, 10 Pick. (Mass.) 528; Prouty v. Wilson, 123 Mass. 297; Smith v. Hawkins, 6 Conn. 444; Rockville Nat. Bank v. Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; N. I. L. § 120 (subd. 6). An indorser may embody in the written terms of the instrument a permission to any holder to extend the time of payment without notifying such indorser, without making his obligation non-negotiable. First Nat. Bank of Pomeroy, Iowa, v. Butterly, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 52 (N. I. L.). But see p. 71, note 6, supra.

⁶⁵ Muir v. Crawford, L. R. 2 H. L. Sc. 456; Owen v. Homann, 4 H. L. Cas. 997; N. I. L. § 120 (subds. 5, 6).

⁶⁶ Powell v. Waters, 17 Johns. (N. Y.) 176; Sterling v. Marietta & S. Trading Co., 11 Serg. & R. (Pa.) 179; President, etc., of Freeman's Bank v. Rollins, 13 Me. 202; Sohn v. Morton, 92 Ind. 170.

⁶⁷ Greenawalt v. McDowell, 65 Pa. 464; Hill v. Bostick, 10 Yerg. (Tenn.) 410.

⁶⁸ Beard v. Root, 4 Hun (N. Y.) 357; Cary v. White, 52 N. Y. 188; Andrews v. Marrett, 58 Me. 539; Continental Life Ins. Co. v. Barber, 50 Conn. 567.

Personal Defenses

- (1) Fraud, whereby the defendant was induced to execute the instrument;
- (2) Duress;
- (3) Want or failure of consideration;
- (4) Illegality, unless the contract is declared void by statute;
- (5) Payment, or renunciation or release, before maturity;
- (6) Discharge of party secondarily liable by discharge of prior party.

CHAPTER VIII

PURCHASER FOR VALUE WITHOUT NOTICE

- 122. What Constitutes.
- 123-124. Value.
- 125-127a. Notice and Bad Faith.
- 128-131. Presumption and Burden of Proof—Order of Proof.

WHAT CONSTITUTES

122. To constitute a purchaser of a negotiable instrument a purchaser for value without notice, the purchase must be:
- (a) For a valuable consideration.
 - (b) Without notice of facts which impeach its validity between antecedent parties.

It remains in this chapter to examine consideration and notice, the two other elements of bona fide title yet undiscussed. The purchaser, in order to entitle him to the immunities of negotiability, must be both a holder¹ for value,²

¹ As in the case of a transfer of real or personal property, a purchaser takes subject to equities, if at the time when he gets in the legal title he has not paid value or has had notice. See *supra*, p. 266; section 191, N. I. L. Section 49, N. I. L., provides: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferee had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferee. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made." *Offenstein v. Weigandt*, 89 Kan. 739, 132 Pac. 991 (N. I. L.); *Witt v. Campbell Lakin Sug. Co.*, 68 Or. 144, 134 Pac. 316 (N. I. L.); *Elgin City Banking Co. v. McEachern*, 163 N. C. 333, 79 S. E. 680 (N. I. L.). Compare *Selbold v. Ruble* (Okla.) 137 Pac. 696; *Carstensen & Anson Co. v. Wright*, 25 Idaho, 492, 138 Pac. 830 (N. I. L.); *Clement v. Saratoga Holding Co. (Sup.)* 145 N. Y. Supp. 628 (N. I. L.). A maker or drawer in possession of an instrument payable to himself and not indorsed by him is not a

² See note 2 on following page.

and also a holder without notice.* Both of these factors must concur in his holding. A purchaser for value may or may not be a purchaser without notice. A purchaser

holder within the meaning of this section. *Market & F. Nat. Bank v. Ettenson's Estate*, 172 Mo. App. 404, 158 S. W. 448 (N. I. L.).

² A holder for collection, who holds the instrument in trust to turn over the proceeds to a prior holder, who was subject to equities, cannot recover on the instrument, since to permit a recovery by him would result only in a circuity of action. Ordinarily such a holder pays no value for the instrument, and this furnishes an additional reason for denying recovery, since he is not then a holder in due course. See *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78 (N. I. L.); *Third Nat. Bank v. Exum*, 163 N. C. 199, 79 S. E. 498; *Stones River Nat. Bank v. Lerman Milling Co.* (Ala. App.) 63 South. 776. Section 37, N. I. L., provides: "A restrictive indorsement confers upon the indorsee the right: (1) To receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement." The wording of this section does not show clearly the nature of the rights of the indorsee for collection and has resulted in some confusion. In *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858 (N. I. L.), the action was by the holder of a note, to whom it was indorsed (in terms on the face of the note) for collection, against the maker. The answer alleged payment to the indorser of the note for collection, after the indorsement to the plaintiff. The plaintiff's reply alleged that he was, prior to its indorsement to him, owner of a two-sevenths interest in the note. On the trial the court admitted evidence that the plaintiff had paid value for and owned two-sevenths of the note. The trial court charged the jury that any settlement made by the defendant with the payee after the indorsement would not be a defense against the plaintiff's two-sevenths interest. Judgment on a verdict for the plaintiff was reversed, the court giving as a reason for its decision that parol evidence is not admissible to vary the terms of a written contract. But as between the indorser for collection and the indorsee it is clear that parol evidence would be admissible to show that the indorsee was to collect only part of the note for such indorser. Nor can the decision be sustained on the ground that the written words "for collection" on the face of the note were a representation to third persons that the indorsee was trustee for the indorser of the entire proceeds. Assuming that there was such a representation made by the bank holding the note for collection, there is nothing in the principal case to show a reliance

* See note 3 on following page.

without notice irrespective of the rights he may acquire upon transfer, cannot overcome equities if he has paid no value. In the former case it makes little difference that the holder took the instrument and paid its face for it; in

upon such misrepresentation by the defendant in making the payment to the indorser for collection, who did not have the instrument in his possession. See *Bank of Baraboo v. Laird*, 150 Wis. 243, 136 N. W. 603 (N. I. L.). The decision in the principal case, therefore, seems erroneous. *A fortiori*, such a decision is erroneous where, at the time of the indorsement for collection, the indorsee is trustee of the entire prospective proceeds of the obligation for the indorser, but subsequently and before payment by the maker to the payee indorser, pays the indorser the face value of the note in return for his equity. For this reason the case of *Williams, Deacon & Co. v. Shadbolt*, 1 Cababé & Ellis, 529, seems to have been incorrectly decided.

* "Bona fide holder," "innocent indorsee," "bona fide holder without notice and for value," "purchaser in the usual course of business," "purchaser in due course," "holder in due course," "purchaser without notice," are terms indifferently and synonymously, though loosely, applied to what is in this section termed "the purchaser for value without notice." The Negotiable Instruments Law, like the English Bills of Exchange Act, uses the term "holder in due course." "The act has substituted the term 'holder in due course' for the cumbrous equivalent 'bona fide holder for value without notice': and its synonyms 'bona fide holder,' 'innocent holder,' etc." Chalm. Bills Exch. (4th Ed.) 89. Section 52, N. I. L., provides: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became a holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." A payee may be a holder in due course within the meaning of this section. Thus the innocent payee of a note altered by the maker after an irregular indorser had signed and before delivery to the payee is a holder in due course and can recover against such indorser according to the original tenor of his indorsement. *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592 (N. I. L.). See page 322, *supra*. See, also, *Hathaway v. Delaware County*, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909 (N. I. L.); *Brown v. Miller* (Idaho) 125 Pac. 981 (N. I. L.). Compare *St. Charles Savings Bank v. Edwards*, 243 Mo. 553, 147 S. W. 978 (N. I. L.); *Jones v. Citizens' State Bank*, 89 Okl. 393, 135 Pac. 373.

the latter, that he took the instrument in the truest faith.⁴ In the present chapter we shall consider the questions: What consideration is necessary to make the holder a purchaser for value, and how far "antecedent" or "pre-existing" indebtedness is sufficient; what constitutes notice; and, lastly, what presumptions of evidence attach to a negotiable bill or note in the hands of a bona fide holder upon trial.

VALUE

123. **Value, as a consideration for transfer, means any legal consideration sufficient to support a contract.**
124. **A bill or note transferred as collateral security for an existing indebtedness is in most jurisdictions held to be transferred for value.**

"Value" in the term "purchaser for value" means "either money or money's worth."⁵ It may be cash paid out. It may be goods given. It may be rights surrendered. It may be liabilities incurred. Anything which men in business call "property," anything for which a court, on some one being deprived of it, would award damages, is value; and the purchaser who gives it in exchange for a bill or note is a purchaser for value, or a purchaser for a valuable consideration.⁶

⁴ Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577. 60 Am. Rep. 443; Weaver v. Barden, 49 N. Y. 286.

⁵ 2 Ames Cas. Bills & N. p. 867.

⁶ N. I. L. § 25, provides in part: "Value is any consideration sufficient to support a simple contract." Under this provision it has been held that a promise is value. Robertson v. U. S. Live Stock Co. (Iowa) 145 N. W. 535 (N. I. L.). Thus, where a time note is transferred as conditional payment of a debt of the transferror to the transferee, the promise not to sue on the original debt before default on this note is value. Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046 (N. I. L.); Hamilton Machine Tool Co. v. Memphis Nat. Bank, 84 Ohio St. 184, 95 N. E. 777 (N. I. L.); Griswold, Hallette & Persons v. Davis, 125 Tenn. 223, 141 S. W. 205 (N. I. L.). And under section 25, N. I. L. such a transfer must be held to have been for value, although the instrument transferred in conditional payment is a demand instrument. This seems

Antecedent indebtedness means a debt already existing at the time of the execution of a contract, whatever it may be. Such, for example, are a note for which a renewal note is given, or a debt created in buying goods for which, at the

a correct statement of pre-existing law as to a transfer by indorsement to be applied in payment of the indorser's debt to the indorsee, unless the indorser defaults, for in such case the indorsee promises not to sue on the original debt before he has fixed the liability of the indorser by presentment and notice of dishonor, and thus put the indorser in default. Where, however, the demand note transferred is to be absolute payment only if the maker does not default, the transferee does not promise to refrain from suit on the original debt of the transferror for even a moment of time. Under such circumstances the transfer has been held to be without value, even under the N. I. L. Commercial Nat. Bank of Council Bluffs v. Citizens' State Bank of Armour, S. D., 132 Iowa, 708, 109 N. W. 198 (N. I. L.). So the issue of stock by a corporation is value within the meaning of this section. Wells v. Duffy, 69 Wash. 310, 124 Pac. 907 (N. I. L.). So the promise of a bank to pay on demand a certain sum, that is, a bank credit, is value. But since such a promise is to pay money only, in return for the instrument, and is not negotiable, where the promise is to pay the full amount due according to the face of the instrument, to permit a recovery by the bank would result only in circuituity of action, since the former holder—the depositor—who took the instrument subject to the equity is constructive trustee of its proceeds, i. e., his claim against the bank, for the party who has the equity. See Consolidation Nat. Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353 (N. I. L.); Mehlinger v. Harriman, 185 Mass. 245, 70 N. E. 51 (N. I. L.); German Am. Bank v. Lewis (Ala. App.) 63 South. 741 (N. I. L.); Elk Valley Coal Co. v. 3rd Nat. Bank, 157 Ky. 617, 163 S. W. 786 (N. I. L.); Standing Stone Nat. Bank v. Walzer, 162 N. C. 53, 77 S. E. 1006; Miller v. Norton & Smith, 114 Va. 609, 77 S. E. 452. As to when, on account of withdrawals and new deposits, the depositor's claim against the bank ceases to be a trust res, see Northfield Nat. Bank v. Arndt, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82 (N. I. L.). For this reason the bank, although a holder in due course, should not be permitted to recover more than the face of the instrument less the amount which it still owes the holder (who was a constructive trustee of the note for the defendant) on the credit which it gave for the transfer of the note to it by such constructive trustee. N. I. L. § 54, however, provides: "Where the transferee receives notice of any infirmity in the instrument or defect in title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid

expiration of the terms of credit for which the goods were sold, a note is given in extension. The importance of the doctrine relates almost always to the question whether the purchaser of the paper is a holder for value or not. If he

by him." This modification implies that a promise to pay money is not value for a transfer. Hence the statement frequently met in cases decided under the N. I. L. that a promise to pay money, a bank credit, is not value for a transfer, but that its performance alone constitutes value. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192 (N. I. L.); *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665 (N. I. L.); *National Bank of Barre v. Foley*, 54 Misc. Rep. 126, 103 N. Y. Supp. 553 (N. I. L.); *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511 (N. I. L.); *Bank of Morehead v. Hernig*, 220 Pa. 224, 68 Atl. 679 (N. I. L.); *S. W. Nat. Bank v. House*, 172 Mo. App. 197, 157 S. W. 809 (N. I. L.). Accordingly under this section it has been held that when fraud or illegality constituting a defect in the title of the transferee to the bank is shown, the burden is upon the bank to show, not only that it gave a bank credit for the instrument, but how much it has paid out on account of that credit. *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068 (N. I. L.). In *National Bank of Barre v. Foley*, 54 Misc. Rep. 126, 103 N. Y. Supp. 553 (N. I. L.), the court went so far as to hold that where the instrument was obtained from the defendant by fraud as against him it was not sufficient for the plaintiff bank to show a credit of the amount of the note, less the discount, and the withdrawal of that amount by the depositor. And in *Consol. Nat. Bank v. Kirkland*, 99 App. Div. 121, 91 N. Y. Supp. 353 (N. I. L.), it was held by the majority of the court that the trial court did not err in finding that the plaintiff indorsee was not a holder for value, although the undisputed evidence was that the plaintiff credited the payee with the face amount, that the payee became insolvent on the next day, and that the amount to his credit at the plaintiff bank then and before notice of fraud to the plaintiff was much less than the amount of this note. In other respects, however, this section seems to have been construed as declaratory of the pre-existing law. Thus in *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82 (N. I. L.), it was held, although the court does not discuss this point, that where the payment by the bank of the depositor's checks, drawn to the full amount of the credit given for the instrument transferred, was made before the bank had actual notice of the defendant's equity, *but after the maturity of the instrument transferred* and on which the suit was brought, the bank was a holder in due course and entitled to recover the full amount of the instrument. Accord: *First Denton Nat. Bank v. Kenney*, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (N. I. L.),

is to be treated as a holder for value, then the defenses in favor of prior parties are ruled out; if not, then any prior party may raise such defenses as he has against the person who has taken the instrument without notice, but in consideration of the alleged antecedent indebtedness.

semble. See *Albany County Bank v. People's Co-operative Ice Co.*, 92 App. Div. 47, 86 N. Y. Supp. 773 (N. I. L.). And where the obligation to pay money which is given for the transfer is a negotiable instrument, so that payment by the bank to the cestui of the bank's transferror, whose title was defective, would not be a defense in a subsequent action against the bank on such negotiable instrument, it is held that the bank can recover the face amount of the instrument transferred to it. *Mehlinger v. Harriman*, 185 Mass. 245, 70 N. E. 51 (N. I. L.) (one of two possible grounds for decision); *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747 (N. I. L.); *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907 (N. I. L.). So where the bank, at the direction of the party with defective title who transfers the instrument to it for credit, charges his account as credited with the amount of the instrument and enters into an obligation to a third person in substitution therefor, the bank is entitled to recover for the face of the instrument. *Montrose Savings Bank v. Clausen*, 137 Iowa, 73, 114 N. W. 547 (N. I. L.). If, however, the promise to such third person by the transferee in return for the transfer is not supported by any consideration moving from such third person to the bank, the transaction amounts to a turning over by the transferror of the instrument, of the proceeds of a trust res to a third party for no value. This third party is therefore a constructive trustee of his rights, in jurisdictions recognizing such person as having a fixed right against the promisor, for the benefit of the defrauded maker. In such a case, therefore, to permit a recovery by the transferee would result merely in a circuity of action. No injustice is done to the bank, providing the obligation running to such third person is non-negotiable. Accordingly in *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841 (N. I. L.), it was held that where the instrument is indorsed by the payee in return for a promise to pay all the debts of the payee, the indorsee takes subject to the equities of the maker against the payee. *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841 (N. I. L.). Another section of the N. I. L., the terms of which do not disclose that the reason for the rule as stated is the desirability of preventing circuity of action, is section 27, which provides: "Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien." Where an instrument is transferred by one who holds subject to an equitable defense, to another as collateral security, the equity of redemption of the transferror against the pledgee, the transferror holds in

The wisest theory, all things being considered, is the doctrine of Judge Story.⁷ He lays down the doctrine that receiving such paper in payment or as security for a pre-existing debt is receiving it for a valuable consideration. "It is for the benefit and convenience of the commercial world," he says, "to give as wide an extension as practicable to the credit and circulation of negotiable paper, that it

trust for the party to whose equity he is subject. Thus to permit the pledgee to recover more than the debt for which the instrument was transferred to him as security would result only in a circuitu of action. Accordingly, the rule is laid down that the pledgee can recover only to the extent of his lien from a party as to whom his transferor's title was defective. Brown v. James, 80 Neb. 475, 114 N. W. 591 (N. I. L.); Jett v. Standafer, 143 Ky. 787, 137 S. W. 513 (N. I. L.); Blairsville Nat. Bank v. Crabbs, 44 Pa. Super. Ct. 454 (N. I. L.); Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042 (N. I. L.); Batterman v. Butcher, 95 App. Div. 213, 88 N. Y. Supp. 685 (N. I. L.); Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49 (N. I. L.); Payne v. Zell, 98 Va. 294, 36 S. E. 379 (N. I. L.); Elk Valley Coal Co. v. 3rd Nat. Bank, 157 Ky. 617, 163 S. W. 766 (N. I. L.). This section has been construed as declaratory of the pre-existing law. Thus in Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331 (N. I. L.), it was held that where the equity was not in the maker defendant, but in the payee against his indorsee, who transferred the instrument to the plaintiff as security for a loan, less than the face of the instrument in amount, the plaintiff could recover the face amount from the maker. So, also, it is held that the burden of proof upon the holder to show that he is a holder in due course is satisfied by proving that the instrument was transferred to such holder as collateral security for a debt then created. If the defendant wishes to limit the recovery, he must show the proper limit. Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254 (N. I. L.); Gold Glen Mining, Milling & Tunneling Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677 (N. I. L.).

⁷ Swift v. Tyson, 14 Curt. Dec. 166, 16 Pet. 1, 10 L. Ed. 865, Johns. Cas. Bills & N. 179. The opinion in Swift v. Tyson, so far as it declared that paper taken as collateral security for an antecedent debt is taken for value, has been the subject of adverse criticism; but it has been affirmed after full discussion in BROOKLYN CITY & N. R. CO. v. NATIONAL BANK OF THE REPUBLIC, 102 U. S. 14, 26 L. Ed. 61, Moore Cases Bills and Notes, 206. Harlan, J., said: "Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without

may pass, not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. * * * The [opposite] doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts." This doctrine is followed by the weight of authority throughout the United States. And it certainly seems the sounder business policy to maintain that the transfer of a negotiable security both in payment and as security for an antecedent debt is a transfer for value.⁸ However, the courts of some jurisdictions, and

express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice."

⁸ Bank of Metropolis v. New England Bank, 1 How. 234, 11 L. Ed. 115; Barney v. Earle, 13 Ala. 106; Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Meadow v. Bird, 22 Ga. 246; Conkling v. Vail, 31 Ill. 166; McKnight v. Knisely, 25 Ind. 336, 87 Am. Dec. 364; Homes v. Smyth, 16 Me. 177, 33 Am. Dec. 650; Blanchard v. Stevens, 3 Cush. (Mass.) 162, 50 Am. Dec. 723; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Outhwhite v. Porter, 13 Mich. 533; Stevenson v. Hyland, 11 Minn. 198 (Gil. 128); Struthers v. Kendall, 41 Pa. 214, 80 Am. Dec. 610; Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 128. See, also, Bridgeport City Bank v. Welch, 29 Conn. 475; Manning v. McClure, 38 Ill. 490; President, etc., of Washington Bank v. Lewis, 22 Pick. (Mass.) 24; Fisher v. Fisher, 98 Mass. 303; Armour v. McMichael, 36 N. J. Law, 92; Cobb v. Doyle, 7 R. I. 550; Newman v. Aultman, Miller & Co. (Tenn.) 51 S. W. 198. N. I. L. § 25, provides: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Under this section, as before the adoption of the N. I. L, it is clear that where the instrument transferred is accepted in absolute or even conditional payment (in the case of a time instrument) value is given for the transfer. Campbell v. Fourth Nat. Bank of Cincinnati, 137 Ky. 555, 126 S. W. 114 (N. I. L.); American Nat. Bank v. J. S. Minor & Son, 142 Ky. 792, 135 S. W. 278 (N. I. L.); Milius v. Kauffmann, 104 App. Div.

particularly of the state of New York, have taken issue with the doctrine of Judge Story. The reasoning of these courts is based not so much upon the practical doctrines of commercial convenience as upon the strict logic of the law itself. Their doctrine is that the position of the bona fide holder rests its foundations upon the equitable doctrine that a purchaser who holds the legal title to property merely as security or as the payment of a pre-existing debt, without parting with anything of value, is not entitled to hold as against the prior equitable owner. The two elements of absence of knowledge and value given must concur to make the holder's equity a superior one. And taking the instru-

442, 93 N. Y. Supp. 669 (N. I. L.). See modification of this section in the N. I. L. as enacted in Wisconsin. Section 1675—51, St. Wis. 1911. So where the transfer as collateral security is part of the consideration for the creation of a debt. *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629 (N. I. L.); *Jett v. Standafer*, 143 Ky. 787, 137 S. W. 513 (N. I. L.); *Second Nat. Bank of Bucyrus, Ohio, v. Werner*, 19 N. D. 485, 126 N. W. 100 (N. I. L.). So where the instrument transferred as collateral is accepted as a substitute for other collateral then surrendered. *American Savings Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390 (N. I. L.); *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331 (N. I. L.). In the following cases it was held that under this section of the N. I. L. a transfer as collateral security for a pre-existing debt is a transfer for value: *State Bank of Halstad v. Bilstad* (Iowa) 136 N. W. 204 (N. I. L.); *Crystal River Lumber Co. v. Consolidated Naval Stores Co.*, 63 Fla. 119, 58 South. 129 (N. I. L.); *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1 (N. I. L.); *Wilkins v. Usher*, 123 Ky. 696, 97 S. W. 37 (N. I. L.); *Campbell v. Fourth Nat. Bank of Cincinnati*, 137 Ky. 555, 126 S. W. 114 (N. I. L.); *Graham v. Smith*, 155 Mich. 65, 118 N. W. 726 (N. I. L.); *National Bank of Commerce in St. Louis v. Morris*, 156 Mo. App. 43, 135 S. W. 1008; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Felt v. Bush* (Utah) 126 Pac. 688 (N. I. L.); *Trust Co. of St. Louis County v. Markee* (C. C.) 179 Fed. 764 (N. I. L.); *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. 126, 111 C. C. A. 166 (N. I. L.); *State Bank of Freeport v. Cape G. & C. R. Co.*, 172 Mo. App. 682, 155 S. W. 1111 (N. I. L.); *Re Hopper-Morgan Co. (D. C.)* 154 Fed. 249 (N. I. L.). In the case last cited the court seems to confuse the ultra vires issuing of accommodation paper by a corporation with the issuing of accommodation paper by an individual. See the opinion of the court, 154 Fed. 257, 262. In *Campbell v. Fourth Nat. Bank of Cincinnati*, supra, *National Bank of Commerce in St. Louis v. Morris*, supra, and *Trust Co. of St. Louis County v.*

ment as a mere security or in nominal payment of a pre-existing debt is not giving value for it. Hence, the position of the holder, lacking the element of value given, does not entitle him to overthrow the defenses which other parties may interpose.⁹ There must be value given or allowed on his part on the strength of the identical paper on which the action is brought to make the holder a purchaser for value.¹⁰ The comparative equities of prior parties and the holder turn upon this point. In case of payment the question is whether he has taken the instrument in nominal payment, without other evidence of intention to discharge it than the ordinary business transaction of accepting it, or receipting it in payment, or crediting it on account. In each of these latter cases he stands in the position he held before receipt of the paper; with the added property of the paper in his hands, for which he has neither given nor suffered anything. His right to proceed upon the original in-

Markee, *supra*, the courts relied upon section 27 as impliedly requiring this construction of section 25. See Canadian Bank of Commerce v. John J. Sesnon Co., 68 Wash. 434, 123 Pac. 602; Farmers' Bank of Lyons v. Dixon, 91 Neb. 652, 136 N. W. 845. In New York the question has not been passed upon by the Court of Appeals, but the weight of decision in the Appellate Division construes section 25 as declaratory of the pre-existing law in that state; that is, holds that a transfer as security for the payment of a pre-existing debt is not a transfer for value. Sutherland v. Mead, 80 App. Div. 103, 80 N. Y. Supp. 504 (N. I. L.); Roseman v. Mahony, 86 App. Div. 377, 83 N. Y. Supp. 749 (N. I. L.); Bank of America v. Waydell, 103 App. Div. 25, 92 N. Y. Supp. 666 (N. I. L.); Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925 (N. I. L.); Gansevoort Bank of City of New York v. Gilday, 53 Misc. Rep. 107, 104 N. Y. Supp. 271 (N. I. L.); Harris v. Fowler, 59 Misc. Rep. 523, 110 N. Y. Supp. 987 (N. I. L.); Carpenter v. Maloney, 138 App. Div. 190, 123 N. Y. Supp. 61 (N. I. L.). Contra: Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606 (N. I. L.).

⁹ Stalker v. McDonald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389. In this case it was held that where the person receiving the bill has taken it merely in payment or security of an antecedent debt, having neither parted with value on the credit of it nor given up a previous security, he will not be entitled to hold the bill against the former rightful owner, in case of an unauthorized transfer. See note 8, *supra*.

¹⁰ Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268, Johns. Cas. Bills & N. 183. See note 8, *supra*.

debtors after the maturity of the paper is unimpaired. And equity will not tolerate his holding the additional paper to the prejudice of those parties who have prior rights or defenses which render his claim a wrongful one. Hence, the rule is established in many states, in contradiction to the wiser theory of Judge Story, that one who receives paper before it is due, without any notice or knowledge of any fraud in its inception or transfer, but for a precedent debt, and without parting with any value or valuable consideration, does not acquire a valid title to the paper, but takes it subject to all its infirmities.¹¹ The courts who have adopted this position have, however, confined the scope of the rule to narrow limits. If it appears that the holder has in any wise given value for the transfer, his title has been supported. This has given rise to a large number of decisions as to the meaning of value in taking paper, both in payment of and as collateral security for a precedent debt, which may be approximately classified as follows:

(1) Value is given upon transfer when the instrument is transferred in satisfaction of a pre-existing debt, whether it is in whole or part payment of the debt,¹² or whether the instrument surrendered has matured, or is not yet due.¹³ This is because the creditor, in surrendering his rights under the old debt in exchange for the new paper, parts with value.¹⁴

¹¹ *Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 37 Am. Rep. 494; *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142; *Turner v. Treadway*, 53 N. Y. 650; *Weaver v. Barden*, 49 N. Y. 286; *Lawrence v. Clark*, 36 N. Y. 128; *Farrington v. Frankford Bank*, 24 Barb. (N. Y.) 554; *Moore v. Ryder*, 65 N. Y. 438; *Potts v. Mayer*, 74 N. Y. 594; *Rosa v. Brotherson*, 10 Wend. (N. Y.) 85; *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *Goggerly v. Cuthbert*, 2 Bos. & P. (N. R.) 170; *Evans v. Kymer*, 1 Barn. & Adol. 528; *Jones v. Fort*, 9 Barn. & C. 764; *Wormley v. Lowry*, 1 Humph. (Tenn.) 468; *Ingham v. Vaden*, 3 Humph. (Tenn.) 51; *Rhea v. Allison*, 3 Head (Tenn.) 176; *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329. As to the effect of the N. I. L., see note 8, *supra*.

¹² *Chrysler v. Renois*, 43 N. Y. 209. See note 8, *supra*.

¹³ *Day v. Saunders*, 1 Abb. Dec. (N. Y.) 495; *Youngs v. Lee*, 12 N. Y. 551.

¹⁴ *Mayer v. Heidelbach*, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850; *American Exch. Nat. Bank v. New York Belting & Packing Co.*,

(2) Value is given upon transfer when, at the time thereof, security is surrendered by the holder in consideration of the receipt by him of the instrument.¹⁵

The situation of the creditor discharging a pre-existing debt or surrendering securities in consideration of the transfer of paper to him, from a legal point of view, is not similar to that of a creditor receiving paper as collateral security for a debt due from the transerrer to him. In taking the paper as collateral security, the creditor still retains all his rights upon the original indebtedness. The paper is received by him merely to further assure the certainty of the recovery of his debt. He may or may not recover it in full, and if he does not he may proceed upon his collateral. Therefore, in weighing the comparative equities of such persons and those from whom the paper has been derived through wrong, the turning point is naturally value. This renders the equity superior or inferior according as it has or has not been given. And in determining the question, the cases have been classified as follows:

(1) Where the debt is contracted at the time of transfer and on the faith of the bill or note, or indorsement of a third party as collateral security, that debt itself forms a part of the consideration of the transfer and constitutes value. This is because the holder may be supposed to part with his property upon the faith not only of the principal instrument, but also of the instrument put up as collateral. The two, as elements of the consideration, are inseparable. The courts will not inquire whether the holder parted with value because of the original or because of the collateral paper. They consider such value given for both.¹⁶

¹⁵ Hun, 446, 26 N. Y. Supp. 822; Ward v. Howard, 88 N. Y. 74; Chrysler v. Renois, 43 N. Y. 209; Brown v. Leavitt, 31 N. Y. 113; Youngs v. Lee, 12 N. Y. 551; Mix v. National Bank of Bloomington, 91 Ill. 20, 33 Am. Rep. 44; Bardsley v. Delp, 88 Pa. 420; Norton v. Walte, 20 Me. 175; Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 128; Kellogg v. Fancher, 23 Wis. 21, 99 Am. Dec. 96; McKnight v. Knisely, 25 Ind. 336, 87 Am. Dec. 364; Mayberry v. Morris, 62 Ala. 116.

¹⁶ See note 8, *supra*.

¹⁶ Bank of New York v. Vanderhorst, 82 N. Y. 553; President, etc.,

(2) Where the instrument is accommodation paper, that fact is no defense to a holder who receives it as collateral to a pre-existing debt. This is because the delivery of the instrument as collateral is in furtherance of the purpose of the accommodation, which was to obtain credit. The equity of the holder, who so takes it, is therefore superior to that of the accommodation party who gives it.¹⁷ But the reason of this rule ceases to apply, and the rule itself is otherwise, when the instrument has been diverted or procured through fraud.¹⁸

(3) Where the pre-existing debt has fallen due, and there is a transfer of a bill or note as collateral security with an express agreement, or request, for delay. The forbearance is a sufficient consideration. This is because such forbearance is a surrender by the holder of his valuable right of immediate prosecution.¹⁹ But if the agreement is invalid, and there is no legal reason why the holder should not prosecute, the receipt of the paper is upon a consideration which is worthless in law, and the holder is deemed to have given no value.²⁰

(4) In addition to these rules are the principles already discussed, which apply to the position of the holder taking the instrument as collateral, as well as when he takes it in payment. They are (a) where the note is received in payment of one then surrendered and canceled, or in absolute payment, (b) and where securities are surrendered.

The principles upon which the title of the holder of col-

of *Bank of Chenango v. Hyde*, 4 Cow. (N. Y.) 587; *Williams v. Smith*, 2 Hill (N. Y.) 301. See note 8, supra.

¹⁷ *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *GROCERS' BANK OF NEW YORK v. PENFIELD*, 69 N. Y. 502, 25 Am. Rep. 231, *Moore Cases Bills and Notes*, 138; *Schepp v. Carpenter*, 51 N. Y. 602. See *Re Hopper Morgan Co.* (D. C.) 154 Fed. 249 (N. I. L.), and cases there cited.

¹⁸ *Schepp v. Carpenter*, 51 N. Y. 602; *Spencer v. Ballou*, 18 N. Y. 331; *Bank of Rutland v. Buck*, 5 Wend. (N. Y.) 66.

¹⁹ *Mechanics' & Farmers' Bank of Albany v. Wixson*, 42 N. Y. 438; *Traders' Bank of Rochester v. Bradner*, 43 Barb. (N. Y.) 379; *Burns v. Rowland*, 40 Barb. (N. Y.) 368; *Watson v. Randall*, 20 Wend. (N. Y.) 201. See note 8, supra.

²⁰ *Atlantic Nat. Bank of New York v. Franklin*, 55 N. Y. 235.

lateral security rests regulate also the amount which may be collected out of it. The holder, taking paper as collateral, can only recover upon it to the amount of the loss which he suffers upon the original paper; that is to say, the amount for which the paper is itself put up as collateral.²¹ If the principal paper is entirely worthless, and in amount equal or in excess of the paper put up as collateral, then he may recover the entire amount of the collateral; but otherwise, it is only what he loses on the principal paper which can measure his damages.²² The amount which a purchaser who has paid less than the face value may recover, however, depends upon other considerations. It is clear that it would impair the utility of commercial paper as a medium of exchange if the maker or acceptor could interpose even a partial defense against a bona fide purchaser, and could prevent him from recovering the face value of the instrument, because of fraud or other circumstances in its inception, which would have been available between the original parties; and many courts, including the Supreme Court of the United States, hold that a purchaser may recover the full amount, though he may have paid less than the face value, whatever the equities between the original parties.²³ Such also is the rule as declared by the Negotiable

²¹ Where a promissory note has been transferred before maturity by way of collateral security for future indorsements to be made to the transferee, which are afterwards made to him, the transferee is to be treated as a bona fide holder. He cannot recover upon the note beyond the amount of the indorsements it was designed to secure the holder against. *Williams v. Smith*, 2 Hill (N. Y.) 301. See note 6, *supra*.

²² *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 573; *Platt v. Beebe*, 57 N. Y. 339; *Huff v. Wagner*, 63 Barb. (N. Y.) 215; *Cardwell v. Hicks*, 37 Barb. (N. Y.) 458; *Duncan v. Gilbert*, 29 N. J. Law, 527; *Atlas Bank v. Doyle*, 9 R. I. 78, 98 Am. Dec. 368, 11 Am. Rep. 219; *Maitland v. Citizens' Nat. Bank of Baltimore*, 40 Md. 540, 17 Am. Rep. 620; *Mechanics' & Traders' Bank v. Barnett*, 27 La. Ann. 177; *Brown v. Callaway*, 41 Ark. 420; *Bell v. Bean*, 75 Cal. 87, 16 Pac. 521. See N. I. L. § 27, and cases considered in connection with same in note 6, *supra*.

²³ *Cromwell v. Sac County*, 96 U. S. 60, 24 L. Ed. 681; *Florida Cent. R. Co. v. Schutte*, 103 U. S. 118, 26 L. Ed. 327; *Lay v. Wissman*, 36 Iowa, 305; *Kitchen v. Loudenback*, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540.

Instruments Law.²⁴ On the other hand, other courts have held that equity will not give the purchaser the benefit of a speculative bargain, but will only protect the purchaser to the extent of his loss.²⁵

NOTICE AND BAD FAITH

125. Notice is either actual or constructive. Bad faith is also either actual or constructive.
126. Actual notice is actual knowledge of the facts constituting the "equity"; that is, the defect in title.
- 126a. Constructive notice is a conclusive presumption that the holder knows that which an ordinary inspection of the instrument would disclose. The purchaser is charged with notice of whatever appears thereon.
127. Actual bad faith is a suspicion of the existence of facts constituting the "equity" or defect in title, followed by a failure to make a reasonably thorough investigation to discover them, because of a fear of such discovery.
- 127a. Constructive bad faith on the part of a transferee is a failure to make a reasonably thorough investigation to determine whether or not a certain "equity" or defect in title exists under such circum-

²⁴ N. I. L. § 57; Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291 (N. I. L.); Jefferson Bank of St. Louis v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641 (N. I. L.). But the amount of the consideration paid is to be considered in determining whether or not the instrument was purchased in good faith. *Re Hill* (D. C.) 187 Fed. 214 (N. I. L.). See note 34, *infra*.

²⁵ *Holcomb v. Wyckoff*, 35 N. J. Law, 35, 10 Am. Rep. 219; *Huff v. Wagner*, 63 Barb. (N. Y.) 215; *Harger v. Wilson*, Id. 237; *Oppenheimer v. Farmers' & Merchants' Bank*, 97 Tenn. 19, 36 S. W. 705, 33 L. R. A. 767, 56 Am. St. Rep. 778. Mr. Daniel supports this view. Daniel, Neg. Inst. §§ 757-758c. The decisions are collected in 4 Am. & Eng. Enc. Law, 346. Even in this view a distinction may properly be drawn in case of accommodation paper. *Daniels v. Wilson*, 21 Minn. 580.

stances that an ordinary person in the position of such transferee would invariably in the usual course of business suspect that there was such an "equity" or defect in title.

The second element necessary to support the title of the purchaser to the instrument is that it must be without notice. This, like the doctrine of value, rests upon the principles of equity. It is a long-established equity precedent that when several different and successive claims upon the same subject-matter exist, and there is a contest between the owners of these interests, the person who acquires a right to the property with knowledge that another person has already a claim to it is deemed to take it subject to that claim. The first-named person has the superior right to the property, while the last-named person owns in subordination to this right. Lord Hardwicke has explained the reason to be that "the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. "This," he says, "is a species of fraud and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate. Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum.*"²⁶ Or, in other words, to express the principle in the language of our later day, and to apply it to the subject-matter of bills and notes, the rule is that when a purchaser takes a bill or note by negotiation, without any knowledge of the equities of prior parties, he takes it on an independent title by the negotiation, and will not be affected by these equities, because he is not in privity with such prior party, does not claim under him, and is not bound by his acts, frauds, or admissions.²⁷ But if he has

²⁶ *Le Neve v. Le Neve*, 2 Amb. 436.

²⁷ *Fisher v. Leland*, 4 Cush. (Mass.) 456, 50 Am. Dec. 805. In the opinion delivered by Shaw, C. J., in this case, he held that, "when an indorsee takes a bill or note, by indorsement, before it is due, and without notice of fraud or other matter of defense, he takes it on an independent title by the indorsement, and will not be af-

knowledge of these things at the time of the purchase of the instrument, and is privy to them, then, because of his knowledge, his title must be in subordination to their rights. This is the fundamental reason for the effect of notice upon the title of the purchaser; and accordingly we find "notice" defined as "the information concerning a fact, actually communicated to a party, by an authorized person, or actually derived by him from a proper person, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge."²⁸ And in our examination of the question of notice, we shall direct our inquiry to the facts and rules which, according to the law merchant, charge the purchaser with knowledge of the equities of prior parties, and make his title subject to these equities.

Notice may be actual or constructive. Under the classification here adopted,²⁹ bad faith means not merely knowledge, but means of knowledge to which the party willfully shuts his eyes.³⁰ In the degree of knowledge necessary to be possessed by the purchaser to charge him with bad faith, the law merchant departs from the rules of equity. In equity jurisprudence notice may be knowledge of any fact sufficient to put a prudent man upon inquiry as to the existence of some right or title in conflict with that he is about to purchase. Such knowledge being shown, the court presumes the purchaser either to have made the in-

fected by any payment, set-off, fraudulent consideration, or other matter of defense, which the acceptor or promisor might have had against any previous party." Johnson v. Way, 27 Ohio St. 374, Johns. Bills & N. 185. As holding that an attachment is unavailable against a bona fide holder for value of negotiable paper who obtains it after attachment before maturity, and without notice, see Kieffer v. Ehler, 18 Pa. 388.

²⁸ Pom. Eq. Jur. § 594.

²⁹ 2 Ames Cas. Bills & N. 868. It is to be noted that "constructive notice" is sometimes used with a broader meaning than that here given, so as to include means of knowledge whether to be derived from the face of the instrument or from other sources.

³⁰ May v. Chapman, 16 Mees. & W. 355.

quiry or else holds him guilty of negligence equally fatal to his claim to be considered a bona fide holder. It is the duty of each purchaser of other property, if facts are brought directly home to him such as would put a reasonably prudent man upon his guard, to prosecute an inquiry. And if the facts of defense, existing, but latent, would have been discovered if the investigation of the purchaser had been pursued to its natural, logical end, then the purchaser, if he did not pursue the inquiry, cannot be deemed to have taken his title in good faith.⁸¹ This doctrine the law merchant rejects. And it is now the rule of the law merchant that mere knowledge of any facts sufficient to put a reasonably prudent man on inquiry is not sufficient, but that to defeat his claim to be considered a bona fide holder he must be guilty of bad faith.⁸² Actual mala fides must be

⁸¹ Williamson v. Brown, 15 N. Y. 854.

⁸² The test of bona fides has varied greatly. "Previous to 1820 the law was much as it is at present, but under the influence of Lord Tenterden due care and caution was made the test. Gill v. Cubit, 3 Barn. & C. 466. In 1834 the king's bench held that nothing short of gross negligence would defeat the title of a holder for value. Crook v. Jadis, 5 Barn. & Adol. 909. Two years later Lord Denman states it as settled law that bad faith alone could disentitle a holder for value. Gross negligence might be evidence of bad faith, but was not conclusive of it. Goodman v. Harvey, 4 Adol. & E. 870. This principle has never been shaken in England, and it seems now finally established in America." Benj. Chalm. Bills & N. 102, note; Backhouse v. Harrison, 5 Barn. & Adol. 1098; Magee v. Badger, 34 N. Y. 247, 90 Am. Dec. 691; Belmont Branch of State Bank of Ohio v. Hoge, 35 N. Y. 65; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178. Section 56, N. I. L., provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." This section codifies the doctrine stated in the text. Vaughn v. Johnson, 20 Idaho, 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816 (N. I. L.); Arndt v. Aylesworth, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638 (N. I. L.); People's Bank of Minneapolis v. Reid, 86 Kan. 245, 120 Pac. 339 (N. I. L.); Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655 (N. I. L.); Bothwell v. Corum, 135 Ky. 786, 123 S. W. 291 (N. I. L.); Valley Sav. Bank of Middletown, Frederick County, v. Mercer, 97 Md. 458, 55 Atl. 435 (N. I. L.); Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174 (N. I. L.); Clark v. Roberts, 206 Mass. 235, 92

shown to the satisfaction of the jury to deprive a holder for value of the character of bona fide holder,⁸⁸ and negli-

N. E. 461 (N. I. L.); *Reeves & Son v. Letts*, 143 Mo. App. 196, 128 S. W. 246 (N. I. L.); *Lehnhard v. Sidway*, 160 Mo. App. 83, 141 S. W. 430 (N. I. L.); *Dorsey v. Wellman*, 85 Neb. 262, 122 N. W. 989 (N. I. L.); *Aldrich v. Peckham*, 74 N. J. Law, 711, 68 Atl. 345 (N. I. L.); *Rice v. Barrington*, 75 N. J. Law, 806, 70 Atl. 169 (N. I. L.); *Ketcham v. Govin*, 35 Misc. Rep. 375, 71 N. Y. Supp. 991 (N. I. L.); *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99 (N. I. L.); *Matlock v. Schennerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747 (N. I. L.); *Morrison v. Whitfield*, 46 Pa. Super. Ct. 103 (N. I. L.); *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 848 (N. I. L.); *Hutchins v. Langley*, 27 App. D. C. 234 (N. I. L.); *J. L. Smathers & Co. v. Tax-away Hotel Co.*, 162 N. C. 346, 78 S. E. 224 (N. I. L.). Compare *Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52 (N. I. L.). Actual notice, within the meaning of this rule, consists of a knowledge of the facts constituting the "equity"; that is, the defect in title. Thus, where the equitable defense is that the making of the instrument was induced by fraud, actual notice consists of a knowledge of the fraud, not merely of the representations. *Nelson v. Hudgel*, 23 Idaho, 327, 130 Pac. 85 (N. I. L.). Actual bad faith consists in a suspicion of the presence of such facts, followed by a failure to investigate because of a fear of discovering them. *Iowa Nat. Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237 (N. I. L.); *Link v. Jackson*, 164 Mo. App. 195, 147 S. W. 1114 (N. I. L.); *Clark v. Roberts*, 206 Mass. 235, 92 N. E. 461 (N. I. L.). In the second case just cited the dictum as to the meaning of the word "knowledge," as used in section 56, N. I. L., seems erroneous. Compare *Link v. Jackson*, 158 Mo. App. 63, 139 S. W. 588 (N. I. L.). In *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693 (N. I. L.), the evidence was held sufficient to sustain a finding of actual notice. In *Reeves & Son v. Letts*, 143 Mo. App. 196, 128 S. W. 246 (N. I. L.), *Hurst v. Lee*, 143 App. Div. 614, 127 N. Y. Supp. 1040 (N. I. L.), *State Bank of Freeport v. Cape G. & C. R. Co.*, 172 Mo. App. 662, 155 S. W. 1111 (N. I. L.), *Berryhill-C. Co. v. Manitowoc S. Co. (Fla.)* 63 South. 720 (N. I. L.), *First St. Bank v. Tobin (Okl.)* 134 Pac. 395 (N. I. L.), and *Robertson v. U. S. Live Stock Co. (Iowa)*

⁸⁸ "The proper inquiry is, did the party seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? And, if the jury finds that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen." *Clifford, J.*, in *GOODMAN v. SIMONDS*, 20 How. 343, 15 L. Ed. 934, *Moore Cases Bills and Notes*, 212. As to constructive bad faith, see note 82, *supra*.

gence in not inquiring into facts which ought to have put him on inquiry is not sufficient. Gross carelessness, even,

145 N. W. 535 (N. I. L.), the evidence was held insufficient to sustain a finding of actual bad faith. In *Re Hill* (D. C.) 187 Fed. 214 (N. I. L.), the evidence was held sufficient to sustain a finding of bad faith, although the only evidence of bad faith was the great discount at which the instrument was purchased by the plaintiff. In *S. W. Nat. Bank v. House*, 172 Mo. App. 197, 157 S. W. 809 (N. I. L.), the court held that the fact that the holder bank advanced money to the payee of a check for over \$5,000 on another bank without first having the check certified according to its usual practice was sufficient to sustain a finding that the bank was not a holder in due course. It is submitted that this decision is erroneous. Compare *St. Wis.* 1913, § 1676—22 (5). In *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884 (N. I. L.), the court held that the evidence was not sufficient to sustain a finding of good faith. For a statement of circumstances which, although not sufficient to show bad faith or notice as a matter of law, are evidence of bad faith, see *Jobes v. Wilson*, 140 Mo. App. 281, 124 S. W. 548 (N. I. L.), and note 34, *infra*. This section (section 56, N. I. L.) is not, however, construed as changing the law by providing that in every case, if it be found as a fact upon sufficient evidence that the plaintiff became the holder of the instrument when he did not have actual knowledge of the facts constituting the "equity" and without refraining from investigation for fear of discovering such "equity," the plaintiff is a holder in due course if he has paid value for the instrument, or even a holder without notice of a defect in title within the meaning of section 52 (subd. 4). Thus, if the agent who negotiates and receives the transfer for the plaintiff has such knowledge or bad faith, the plaintiff is not a holder without notice of defect in title within the meaning of this subdivision. Thus a corporation is chargeable with the knowledge of the two managers and officers who are in immediate charge of its affairs and who receive the transfer. *Bluthenthal & Bickart v. City of Columbia*, 175 Ala. 398, 57 South. 814. So a bank is charged with the knowledge of its cashier, who acts for it in taking the transfer. *Citizens' State Bank of Lankin v. Garceau*, 22 N. D. 576, 134 N. W. 882 (N. I. L.); *Washington Finance Corp. v. Glass*, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.). And where such agent is the sole person in immediate charge of the business of the corporation the corporation is chargeable with his knowledge, although he is the party whose breach of authority constitutes the defense of the drawer corporation. *Emerado Farmers' Elevator Co. v. Farmers' Bank of Emerado*, 20 N. D. 270, 127 N. W. 522, 29 L. R. A. (N. S.) 567. But the knowledge of an officer other than the one acting for the corporation in negotiating and receiving the transfer does not prevent the corporation from becoming a holder in due course. *First Denton Nat.*

on the part of the holder is not conclusive of notice, though it is, of course, perfectly competent evidence to go to the

Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (N. I. L.). Thus the knowledge of the president of the plaintiff corporation who did not act for it in receiving the transfer, although as president, he countersigned the check which was given in return therefor, and who was also an officer of the maker corporation and made the note in its name for the purpose of appropriating the proceeds to his own personal use, which purpose he carried out, did not prevent the plaintiff corporation from becoming a holder in due course of the note. Chestnut Street Trust & Sav. Fund Co. v. Record Pub. Co., 227 Pa. 235, 75 Atl. 1067, 136 Am. St. Rep. 874. The court said (227 Pa. 241, 75 Atl. 1069): "The fact that Singerly may have intended to do a wrong when he borrowed the money would not fix the trust company with such knowledge merely because he happened to be its president, and acted in that capacity at the time of the loan. 'An exception to the general rule that notice to an agent is notice to a principal arises in case of such conduct of the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest and adversely to that of the principal.'" Accord: City Bank v. Bryan (W. Va.) 78 S. E. 400 (N. I. L.). Compare McCarthy v. Kepreta, 24 N. D. 395, 139 N. W. 992, 48 L. R. A. (N. S.) 65 (N. I. L.); Hartsell v. Roberts (Ala.) 64 South. 90; Robertson v. U. S. Live Stock Co. (Iowa) 145 N. W. 535 (N. I. L.). Section 56, N. I. L., is also construed as not changing the law merchant in so far as by that law certain circumstances were conclusively presumed to show notice of the facts constituting the equity, or bad faith. Thus every holder is presumed to know the facts which an ordinary inspection of the instrument would show to him. So where a certificate of deposit is made payable to C., trustee, or to C., trustee of B., these words are presumed to be known to the purchaser and to create in his mind an actual suspicion of breach of trust. Thus he is not only presumed to know what is on the paper, but if the transfer to him by the payee was a breach of trust he is presumed to have acted in bad faith in taking the transfer unless he makes a reasonably thorough inquiry without discovering any circumstances pointing to a breach of trust. Ford v. H. C. Brown & Co., 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188 (N. I. L.). See *infra*, note 38. Compare Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588 (N. I. L.); also compare First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (N. I. L.). In that case the court said (116 Md. 34, 81 Atl. 231): "Nor do we think that the check itself gave notice of the trust character of this fund. The abbreviation 'Atty.' written in the check after the payee's name, does not necessarily import a trust. 'Attorney' may mean 'assignee,' 'agent,' or 'attorney at law,' and, when it is not coupled with other

jury on the question of bad faith.³⁴ So that in case of bills and notes the purchaser for value is not bound, at his peril,

words of significance, we think the usual and proper meaning given to it is 'attorney at law.' Eichelberger v. Sifford, 27 Md. 320; 4 Cyc. 897. In our opinion, the marginal memorandum on the check, 'In full of A. J. Kenney mortgage,' does not broaden the meaning of the abbreviation 'Atty.' It has been held that a bank is not bound to notice 'marks' or 'memoranda' on checks. In the case of Duckett v. National Mechanics' Bank, 86 Md. 402 [38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513], the court, discussing a check reading, 'Pay to the order of James Scott, Cashier, \$2000, * * * for deposit to the credit of Henry W. Clagett, being the balance of purchase money due him as trustee from John R. Coale,' said: 'The memorandum descriptive of what the funds were or the source from which they came' was not 'a notification to the Merchants' Bank that the fund was impressed with a trust that would be invaded by their being carried to Clagett's individual credits.' Compare City of Newburyport v. First Nat. Bank, 216 Mass. 304, 103 N. E. 782 (N. I. L.); Dearing v. Hockersmith, 25 Idaho, 140, 136 Pac. 794; Gutherie v. Farmers' Bank (Ga. App.) 80 S. E. 511. But in Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633 (N. I. L.), the court intimated that the reason a holder took subject to the defense that a check was negotiated in breach of trust, where the trust purpose was stated upon its face, was that such an instrument was not complete and regular upon its face within the meaning of section 52 (subd. 1), N. I. L. Although by statute the holder of a note and a mortgage as security for the payment of the note is constructively notified of prior recorded conveyances, etc., of the mortgaged property, such statute does not constructively notify the holder of such facts, so as to prevent him from being a holder in due course of the note. Taylor v. Am. Nat. Bank of Pensacola, 64 Fla. 525, 60 South. 783. There is still another class of cases the only explanation of which seems to be that section 56, N. I. L., is declaratory of the pre-existing law merchant. Where a party takes an instrument made in the name of a corporation by an officer thereof, *payable to such party*, in payment of the individual debt of such officer, as a matter of law he is not a purchaser in good faith, so as to be able to successfully claim that as to him the instrument had a valid inception. It is submitted that in such a case the paper is not irregular within the meaning of section 52 (subd. 1), N. I. L. In St. Charles Sav. Bank v. Edwards, 243 Mo. 553, 147 S. W. 978 (N. I. L.), the above conclusion was reached under section 56 on the ground that that section applied only to parties subsequent to the payee. It is submitted, however, that a payee may be a holder in due course and that a proper ground for this decision is that section 56 was not intended to

³⁴ See note 34 on following page.

to be on the alert for circumstances which might possibly excite the suspicions of a wary, vigilant man.⁸⁴ He does not owe to the party who puts negotiable paper afloat the

change the law merchant with respect to what is notice or bad faith as a matter of law. It is true, however, that the above situation presents a problem in the inception of the instrument, a problem of agency, rather than of constructive notice of an "equity." See note 41, *infra*.

⁸⁴ *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583; *Vaughn v. Johnson*, 20 Idaho, 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816 (N. I. L.); *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102 (N. I. L.). Payment of less than the face value of the instrument is under some circumstances evidence tending to show bad faith or notice. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903 (N. I. L.); *Lassas v. McCarthy*, 47 Or. 474, 84 Pac. 76 (N. I. L.); *Re Hill* (D. C.) 187 Fed. 214 (N. I. L.); *Ham v. Merritt*, 150 Ky. 11, 149 S. W. 1131 (N. I. L.); *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907 (N. I. L.); *Davis v. Hibbs*, 73 Wash. 315, 131 Pac. 1135. Evidence that when transferred the instrument showed on its face, or that it was actually known to the transferee, that there had been default in the payment of an installment of interest, tends to support a finding of actual bad faith. *MERCHANTS' NAT. BANK v. BRISCH*, 154 Mo. App. 631, 136 S. W. 28 (N. I. L.); *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302 (N. I. L.); *CITIZENS' SAV. BANK v. COUSE*, 68 Misc. Rep. 153, 124 N. Y. Supp. 79 (N. I. L.); *McPHERIN v. LITTLE*, 36 Okl. 510, 129 Pac. 721, 44 L. R. A. (N. S.) 395. See *Fidelity Trust Co. v. Whitehead* (N. C.) 80 S. E. 1065 (N. I. L.). So where a check for \$16,000 was signed by a corporation, payable to "Cash" and transferred by the person who signed it for the corporation, and the defendant transferee knew that such person was in financial difficulties, these facts are evidence tending to sustain a finding of actual bad faith. *Coleman v. Stocke*, 159 Mo. App. 43, 139 S. W. 216 (N. I. L.). In *Jobes v. Wilson*, 140 Mo. App. 281, 124 S. W. 548 (N. I. L.), the court said that indorsement without recourse, failure to make any inquiries, and purchase at a heavy discount were facts to be considered by the jury in determin-

⁸⁵ "An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other or different rights, or that the liability of the parties is other or different from that which the law would imply from the form or character of the instrument." Per curiam in *Central Bank of Brooklyn v. Hammett*, 50 N. Y. 158.

duty of active inquiry to avert the imputation of bad faith. And the speculative issue of his diligence or negligence does not enter into the question. The question is one simply of good faith in the purchaser; and, unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict for the holder.⁸⁶

Constructive notice is a legal inference from established facts. When the alleged defect appears on the face of the instrument, and is a mere matter of ocular inspection, the question becomes, not one of fact for the jury, but of law for the court. The court determines whether these con-

ting whether or not the plaintiff acted in good faith in receiving the transfer. But in *Leavitt v. Thurston*, 38 Utah, 351, 113 Pac. 77 (N. I. L.), it was held that the fact that the indorsement was without recourse was no evidence of bad faith. The court said (38 Utah, 356, 113 Pac. 80): "The effect of such an indorsement is merely to qualify the 'duties, obligations and responsibilities of the indorser.' We do not see how it can be considered as evidentiary of notice of any infirmity of the instrument. While the court charged the jury that it was not alone sufficient to establish such notice, the court, nevertheless, charged them that it was a proper fact or circumstance to be considered by them in determining whether the plaintiff took the instrument in good or bad faith. * * * We do not think it was." See, also, *Vaughan v. Brandt*, 21 Idaho, 628, 123 Pac. 591 (N. I. L. not referred to and date of instrument does not appear).

⁸⁶ In the case of *Lawson v. Weston*, 4 Esp. 56, it was shown that a bill indorsed in blank had been lost, and the loser had advertised it in the newspaper. The bill was discounted by the plaintiffs for the finder, who was unknown to them. It was held that the plaintiffs could recover if they acted in good faith, and that they were not bound to make inquiries. *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691; *Welch v. Sage*, 47 N. Y. 147, 7 Am. Rep. 423; *GOODMAN v. SIMONDS*, 20 How. 343, 15 L. Ed. 934, Moore Cases Bills and Notes, 212; *Bank of Pittsburgh v. Neal*, 22 How. 99, 16 L. Ed. 323; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Comstock v. Hannah*, 76 Ill. 530; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Worcester County Bank v. Dorchester & M. Bank*, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *MILLER v. FINLEY*, 26 Mich. 249, 12 Am. Rep. 306; *Crosby v. Grant*, 36 N. H. 273; *Johnson v. Way*, 27 Ohio St. 374; *Phelan v. Moss*, 67 Pa. 59, 5 Am. Rep. 402. The statement in the text preceding the reference to this note is not accurate, because it does not take into consideration constructive bad faith. See note 32, supra.

ceded facts constitute in themselves notice.⁸⁷ If so, the notice is not actual, but constructive. In taking such instruments the purchaser is charged with knowledge of the defect, whether he knows of it or not. Instances of this are a restrictive⁸⁸ or a conditional⁸⁹ indorsement, which

⁸⁷ ROCHESTER & C. TURNPIKE ROAD CO. v. PAVOUR, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790, Moore Cases Bills and Notes, 218; Birdsall v. Russell, 29 N. Y. 220; Clafin v. Lenheim, 66 N. Y. 301; Johnson & Kettell Co. v. Longley Luncheon Co., 207 Mass. 52, 92 N. E. 1035 (N. I. L.).

⁸⁸ See *supra*, pp. 124-127, and N. I. L. §§ 36, 37; *Ancher v. Bank of England*, 2 Doug. 63. In this case a bill was drawn by A. on B., payable to C. or order, and indorsed by C. thus: "The within must be credited to D., value in account." D. being indebted to B., and the bill being sent to B., and accepted by him, and he having given D. notice that he had received it and placed it to D.'s account, it was held that this was such a special indorsement as to restrain the negotiability of the bill. Should a forged indorsement be afterwards written upon it, purporting to be by D. to pay to E. or order, and the bill be discounted, the one discounting must bear the loss. *Treuttel v. Barandon*, 8 Taunt. 100. A bill drawn in America on a London house, payable to order, was indorsed by payee generally to A. and by him thus: "Pay to B., or his order, for my use." B. applied to his bankers to discount the bill, which they did without inquiry, and applied the proceeds to the use of B. It was held that the indorsement was restrictive, and that the property in the bill remained in A., who could recover its amount from the bankers. *Lloyd v. Sigourney*, 5 Bing. 525. In *Buckley v. Jackson*, L. R. 3 Exch. 135, it was held that an indorsement of a bill of exchange, "Pay J. S., or order, value in account with H. C. D.", was not restrictive. See *Ford v. H. C. Brown & Co.*, 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188 (N. I. L.), stated in note 32, *supra*. The addition of words after the name of the payee or indorsee describing him as an agent or officer does not necessarily give notice that he takes the instrument as a fiduciary. If the words are thus commonly used to describe an individual or corporation, without stating such a relation, the indorsement is descriptive, but not restrictive. Thus, where an instrument is payable to S., cashier, or order, it is held that the indorsement is that of the bank, and a subsequent holder does not, by reason of the indorsement alone, take subject to the equity of the bank. *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731, 112 N. W. 165 (N. I. L.). See, also, *First Denton Nat. Bank v. Kenney*, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (N.

⁸⁹ ROBERTSON v. KENSINGTON, 4 Taunt. 80, Moore Cases Bills and Notes, 115.

being on the face of the instrument, the purchaser must take at his peril. Another example is paper which shows on its face that there is something irregular or wrong about it.⁴⁰ So where paper bears the irregular indorsement of a

I. L.); Equitable Trust Co. of New York v. Were, 74 Misc. Rep. 469, 132 N.Y. Supp. 351 (N. I. L.). An indorsement without recourse does not describe any fiduciary relation, nor in any other way suggest an "equity." For this reason it is not constructive notice of any "equity." EPLER v. FUNK, 8 Pa. 468, Moore Cases Bills and Notes, 114; Dollar Saving & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587; Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068 (N. I. L.); American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390 (N. I. L.); Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548 (N. I. L.). The question whether or not the plaintiff holder takes with constructive notice of an "equity" by reason of a restrictive indorsement should be distinguished from the question whether or not the principal obligation or the indorsement has, as to the plaintiff, had an inception. See N. I. L. § 21; Bryant, P. & Bryant v. Quebec Bank, [1893] H. C. 170; Empire State Surety Co. v. Nelson, 141 App. Div. 850, 126 N. Y. Supp. 453 (N. I. L.); Zielen v. Baltimore Plant Ice Co., 115 Md. 658, 81 Atl. 22 (N. I. L.). It should be noted that the constructive notice of the facts appearing from the face of the paper has no greater effect in giving rise to constructive notice of the "equity" or constructive bad faith than actual knowledge, from any source, of the same facts. Thus a statement in the instrument of the consideration for which it is given is not notice of the failure of such consideration. Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989 (N. I. L.); First Denton Nat. Bank v. Kennedy, 116 Md. 24, 81 Atl. 227 (N. I. L.). But see the dictum of the court in Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633 (N. I. L.). See note 41, infra.

⁴⁰ Miller v. Crayton, 3 Thomp. & C. (N. Y.) 360; N. I. L. § 52 (subd. 1). If, at the time when an alleged instrument is negotiated to the plaintiff, it is lacking in some respect, such that it is not yet a mercantile specialty, clearly the plaintiff has merely an authority to complete same according to the express or implied directions given by the party whom he seeks to hold liable upon the instrument as completed by him. N. I. L. § 14. See note 61, page 343, supra. It has been held, however, that this section (section 14, N. I. L.) enacts the rule that, if the purchaser knows that the instrument has been completed in some respect since it was signed by the defendant, he is put on guard as to the limits of the authority of the person who completed the instrument. Dumbrow v. Gelb, 72 Misc. Rep. 400, 130 N. Y. Supp. 182 (N. I. L.); Hunter v. Allen, 127 App. Div. 572, 111 N. Y. Supp. 820 (N. I. L.). The decision in the latter case may be

firm, thereby indicating that the indorsement was for accommodation.⁴¹ In all such circumstances it is a part of

sustained upon another ground, namely, that the circumstances known to the plaintiff holder were such that it was constructively notified that the instrument was issued in the partnership name by one partner for the accommodation of another company, and thus was put on inquiry as to the actual consent of the other partner, the defendant. See *Washington Finance Co. v. Glass*, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043 (N. I. L.). See note 41, *infra*. When an instrument has been materially altered, it becomes necessary to determine who is a holder in due course within the meaning of sections 124 and 52, N. I. L. See note 16, page 324, *supra*. The rule laid down in *Elias v. Whitney*, 50 Misc. Rep. 326, 98 N. Y. Supp. 667 (N. I. L.), that where an ordinary inspection of the instrument will show that some part was at some time changed the instrument is not complete and regular upon its face within the meaning of section 52, has been justly criticised. See opinion of Bischoff, J., in *Elias v. Whitney*, *supra*, where he says that there is no presumption that a change in language took place after issue. The justice of this criticism appears from the result in *First Nat. Bank v. Barnum* (D. C.) 160 Fed. 245 (N. I. L.), where the court held that the paper was not complete and regular upon its face, since the place of payment had been changed from that printed upon the original blank form, although the substituted name was in the same handwriting as the body of the note. See *Mitchell v. Reed's Ex'r* (Ky.) 106 S. W. 833; *Ensign v. Fogg* (Mich.) 143 N. W. 82 (N. I. L.); *Langley v. Jodrey*, 13 East. L. R. 432 (Canadian B. E. A.). Compare *Trustees of American Bank of Orange v. McComb*, 105 Va. 473, 54 S. E. 14 (N. I. L.); *Pensacola State Bank v. Melton* (D. C.) 210 Fed. 57 (N. I. L.). In *Goetting v. Day* (Sup.) 87 N. Y. Supp. 510 (N. I. L.), when the check was offered to the plaintiff the indorsement of one R. appeared crossed out. The payee in possession explained by saying that such indorsement had been for his accommodation and that on account of not being able to discount the check the indorsement had been canceled. It was held that the instrument was not incomplete or irregular within the meaning of the N. I. L., and that the plaintiff was not necessarily a purchaser with notice or in bad faith. Another instance of constructive notice and bad faith, covered by the express terms of section 52, is that arising from the fact that the instrument is overdue when negotiated to the plaintiff. *Austin v. 1st Nat. Bank*, 150 Ky. 113, 150 S. W. 8 (N. I. L.); *Otis Elevator Co. v. Ford* (Del. Super.) 88 Atl. 465 (N. I. L.). The fact that an instrument is overdue and unpaid suggests to almost any purchaser that the maker claims to have some defense to an action on the instrument. This reason suggests an implied limita-

⁴¹ See note 41 on page 444.

the legal duty of the purchaser to inquire and ascertain concerning the facts of which the face of the bill or note

tion upon the language of section 52, namely, that the holder who becomes such after maturity takes subject only to "equities" existing at the time of the transfer to him. N. I. L. § 47; Marling v. Fitzgerald, 138 Wis. 93, 120 N. W. 388, 23 L. R. A. (N. S.) 177, 181 Am. St. Rep. 1008 (N. I. L.); Murchison v. Nies, 87 Kan. 77, 123 Pac. 750, semble. The obligation still remains a negotiable mercantile specialty, so that in an action upon it a consideration need not be alleged and proved. Beall v. Russell, 76 Misc. Rep. 244, 134 N. Y. Supp. 633 (N. I. L.). See, however, Thiel v. Butker, 125 La. 473, 51 South. 500, 28 L. R. A. (N. S.) 1065; Austin v. First Nat. Bank of Scottsville, 150 Ky. 113, 150 S. W. 8 (N. I. L.). It is sometimes difficult to determine whether or not an instrument is overdue when negotiated, within the meaning of this rule. In the case of an instrument payable at a fixed future time it is clear that if the transfer is at any time on the day of maturity it is before maturity within the meaning of this rule. Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37 (N. I. L.). See Johns v. Rice (Iowa) 145 N. W. 290 (N. I. L.). In Hodge v. Wallace, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938 (N. I. L.), it was held that a note providing expressly that the failure to pay any installment of interest when due should cause the principal sum of the note to become immediately due and payable is, after such default, overdue within the meaning of this rule. See comments on this decision in Taylor v. American Nat. Bank of Pensacola, Fla., 63 Fla. 631, 57 South. 678 (N. I. L.). To the same effect as Hodge v. Wallace, *supra*, is Voris v. Ferrell (Ind. App.) 103 N. E. 122. See pages 58-60, 112, *supra*. In that case it was held that where the clause purporting to make the principal amount of the note due upon default in any installment of interest was contained, not in the note, but in a mortgage executed as security for the note and transferred with it, the note was not overdue, within the meaning of this rule, at the time of transfer, although such default had occurred. *Contra*: First Nat. Bank of Sturgis v. Peck, 8 Kan. 660. Compare Rowe v. Scott, 28 S. D. 145, 132 N. W. 695. See pages 58-60, 112, *supra*. N. I. L. § 53, provides: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." N. I. L. § 193, provides: "In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of the trade or business (if any) with respect to such instruments, and the facts of the particular case." In First Nat. Bank of Elgin, Ill., v. Russell, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203 (N. I. L.), the court held, as an alternative ground for decision, that a note in terms payable on a fixed day, which contains a warrant of attorney to the holder to confess judgment upon it at any time thereafter and to issue execution upon

gives him notice.⁴² If he fails to make his inquiry, he fails in his full legal duty, and the equities of the case are with the prior parties, who are allowed to interpose them.

such judgment, is due when issued, and a transferee before the day named for payment may be a holder after maturity within the meaning of this rule. This decision seems unsound, since, even conceding this to be a demand instrument, the day suggested on the face of the note should mark the limit of a reasonable time within the meaning of section 53, since non-payment before that time is not a suspicious circumstance. In *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (N. I. L.), it was held that a little over two years, in the case of a cashier's check, which is equivalent to a demand note, was not, under the circumstances found, an unreasonable time within the meaning of section 53. Compare *Riley v. Norton* (R. I.) 89 Atl. 709 (N. I. L.). In *Brophy Grocery Co. v. Wilson*, 45 Mont. 489, 124 Pac. 510 (N. I. L.), it was held that where the payment of a large part of a demand note was indorsed upon it, and the purchaser knew that there was a dispute between the payee and the maker as to the amount due, these facts indicated that as between the parties the paper was regarded as due, and constituted constructive notice of existing equities. Regular monthly payments of interest, however, upon the principal sum of the demand note, may rebut the inference which might otherwise arise that a reasonable time after issue had passed by. *McLean v. Bryer*, 24 R. I. 599, 54 Atl. 373. With respect to ordinary bank checks it is not clear whether or not the same rule as to reasonable time should be applied in determining whether or not a holder takes subject to equities, as in determining whether or not the instrument has been presented for payment within a reasonable time. See page 496 et seq. infra. In *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747 (N. I. L.), the court applies the same test, but finds that according to that test the instrument was not overdue when negotiated to the plaintiff. So in *GORDON v. LEVINE*, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361 (N. I. L.), *Moore Cases Bills and Notes*, 232. In *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655 (N. I. L.), the court held that six days after the date of issue of the check appearing on its face was not such a long time after issue as to make the holder to whom it was then negotiated take subject to the equity of the payee, who had indorsed the instrument in blank and lost it. But it is apparent that in that case the equity was not that of the drawer of the check or the maker of a note, and so would not be suggested by the fact that the instrument was issued several days before. In *Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 399, the court expressed a doubt as to whether or not the same test should be applied. See *COLUMBIAN*

⁴² See note 42 on page 449.

These definite positions were not arrived at until after many changes in the law as it was from time to time administered. And in all the states the law has not yet de-

RANKING CO. v. BOWEN, 134 Wis. 218, 114 N. W. 451 (N. I. L.). Moore Cases Bills and Notes, 235, *infra*, page 498, note 98. In Moskowitz v. Deutsch, 46 Misc. Rep. 603, 92 N. Y. Supp. 721 (N. I. L.), the action was by the indorsee of a check against the drawer of a check. The payee, on the day following that on which the check was dated and delivered to him, told the drawer that he had lost the check. Five or six days later the drawer gave the payee another check, which he cashed. Eleven or twelve days after September 2, the date of the first check, the payee indorsed the same to the plaintiff with the date altered to September 12. When the plaintiff presented the check, payment was refused, because the drawer had stopped payment of it. Judgment for the plaintiff was affirmed on the ground that the plaintiff was a holder in due course, entitled to recover according to the original tenor, and that no legal damage had resulted to the defendant from the delay in presentment since the correct date of issue. The decision is sustainable, it seems, if the test of reasonable time, within the meaning of the rule now under consideration, is different from the test where the question is whether or not due presentment was made. See Pensacola St. Bank v. Metton (D. C.) 210 Fed. 57 (N. I. L.). The court, however, did not discuss this question. As to overdue paper in general, see p. 271 et seq., *supra*. The fact that an installment of interest on a note is due and unpaid does not make the instrument overdue within the meaning of section 52 (subd. 3), except, perhaps, as to that installment. Nor, if such default is known to the plaintiff, is this a dishonor of the instrument known to the plaintiff within the meaning of section 52 (subd. 3). Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302 (N. I. L.). But evidence of such default, known to plaintiff before the transfer to him, is sufficient evidence to require the submission to the jury of the question whether or not the plaintiff acted in good faith. Citizens' Sav. Bank v. Couse, 68 Misc. Rep. 153, 124 N. Y. Supp. 79 (N. I. L.).

⁴¹ West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; National Bank of the Commonwealth v. Law, 127 Mass. 72; *ante*, p. 182. Thus, since "there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership has no interest [for third persons]. * * * the holder of such paper so indorsed, who takes it with notice that the indorsement was made for the accommodation of the maker, cannot hold the firm liable. * * * The partners are liable to a bona fide holder without notice, in such case, only because he has the right to presume that the indorsement was made in the usual course of the partnership business." Fielden v. Lahens, 2 Abb. Dec. (N. Y.) 111; Hunter v. Allen, 127 App. Div. 572, 111 N. Y. Supp.

veloped into the settled positions we have given, regulating the degree of knowledge to be possessed by the holder to deprive him of the privileges of the purchaser for value

820 (N. I. L.). A bank taking the notes of a new corporation organized to carry on the business of an old corporation, in renewal of the notes of the old corporation, has constructive notice that the new notes are for the accommodation of the old corporation and thus ultra vires the maker corporation. *Re Stanford Clothing Co.* (D. C.) 187 Fed. 172 (N. I. L.). Where, however, the officers of a corporation made a note in the corporate name and delivered it for the accommodation of another corporation in which they were interested, and the plaintiff took the instrument for value by indorsement from the accommodated corporation through its officer, and such note was indorsed before delivery to the accommodated corporation by the officers of the accommodating corporation as individuals, and also by an officer of the accommodated corporation as an individual, and where the officer of the accommodated corporation, which had indorsed last and in blank, stated, upon presenting the instrument to the plaintiff for discount, that the note was given to his corporation for value, the form of the note, indorsements, and other circumstances were held insufficient to notify the plaintiff, as a matter of law, of the accommodation and therefore ultra vires character of the paper. *Re Troy & Cohoes Shirt Co.* (D. C.) 136 Fed. 420 (N. I. L.). See, also, *Citizens' Bank & Trust Co. v. Thornton*, 174 Fed. 752, 98 C. C. A. 478 (N. I. L.); *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, 122 Tenn. 415, 123 S. W. 641 (N. I. L.). Though a partner may not sign the firm name to paper for payment of his own debt, and a note so made by him and payable to the debtor would put him upon inquiry whether it was made with authority, a purchaser is not charged with notice that the firm name was wrongfully used where he purchases a note made in the firm name to the order of one partner, who transfers it for his own debt, since there is nothing upon the face of the paper inconsistent with its having been duly issued to such partner. *Ridley v. Taylor*, 13 East, 175. This is true, it seems (and so in the case of corporate paper issued by an officer in his own favor), only when the amount for which made and other circumstances do not point clearly toward a breach of authority. In *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45 (N. I. L.), the defendant sold her stock in a corporation to the treasurer, who was also president and manager, receiving his notes in part payment. In payment of these notes from time to time he indorsed to her checks made by him for the corporation in favor of himself. An investigation would have shown that he was overdrawing his salary account. The trial court found good faith, as a fact, on the part of the defendant. It was held that the defendant was not notified as a matter of law of the breach of authority by the officer. But where the instrument was a note of the corporation made, ac-

without notice. The old tests are applied, which are not always in terms whether there was actual notice consisting either of direct knowledge of the defense or willful ig-

cording to its terms, by an officer in his own favor for \$2,000 and indorsed in payment of his individual debt these facts were held to give notice, as a matter of law, to the creditor of his breach of authority in issuing the note for that purpose. *Kenyon Realty Co. v. National Deposit Bank*, 140 Ky. 133, 130 S. W. 965, 31 L. R. A. (N. S.) 169 (N. I. L.). Compare *Standard Steam S. Co. v. Corn Ex. Bank*, 84 Misc. Rep. 445, 146 N. Y. Supp. 181 (N. I. L.); *Fr. Savings Bank v. Int. Trust Co.*, 215 Mass. 231, 102 N. E. 363 (N. I. L.). In *Orr v. South Amboy Terra Cotta Co.*, 47 Misc. Rep. 604, 94 N. Y. Supp. 524 (N. I. L.), the court went so far as to hold that one taking by indorsement an instrument made in the corporate name in favor of any one of its officers, including a director, has constructive notice of any breach of authority in its issue. The dissenting opinion of McLean, J., seems sound. See *Johnson & Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 92 N. E. 1035 (N. I. L.), and *Watts v. Gordon*, 127 Tenn. 96, 153 S. W. 483 (N. I. L.). See, also, *Smith v. Courant Co.*, 23 N. D. 297, 136 N. W. 781 (N. I. L.). But, as pointed out above in the case of a partnership, where the instrument signed by the officer for the corporation is made payable to the creditor of the officer and delivered by the officer to the creditor in payment of such debt, the creditor is put on inquiry as to a breach of authority in issuing the paper. *Johnson & Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 92 N. E. 1035 (N. I. L.); *St. Charles Sav. Bank v. Edwards*, 243 Mo. 553, 147 S. W. 978 (N. I. L.). And where an instrument made payable to the plaintiff is delivered to the plaintiff in payment of the debt of the person in possession of the instrument, instead of the debt of the maker of the instrument, the plaintiff is ordinarily put on guard as to a breach of authority in delivering the paper to him for such consideration. Thus, in *Lanning v. Trust Co. of America*, 137 App. Div. 722, 122 N. Y. Supp. 485 (N. I. L.), it was held that where a check for \$35,000 was drawn, payable to the drawee trust company by the treasurer of a corporation, in its name, and such check was delivered to the trust company in payment of the individual debt of the president of the drawer corporation, and the trust company knew that the corporation has a capital stock of only \$100,000 and little or no surplus, and where such trust company made no investigation before taking the paper, it was, as a matter of law, guilty of bad faith. So in *Bowles Co. v. Fraser*, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N. S.) 613, it was held that the payee of a check had constructive notice of a breach of authority in delivering it to him. (In that case there was no reference to the N. I. L., and the date of the instrument does not appear from the report.) But see *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426 (N. I. L.). Simi-

norance of it or whether there was constructive notice of the facts. The question is sometimes whether the holder was a bona fide transferee or a purchaser in the due or

lar conclusions are reached where the question is whether or not there has been a transfer of title to the plaintiff. Thus where an instrument is payable to or indorsed specially to a corporation, and is indorsed by an officer of that corporation to the plaintiff in payment of an individual debt of such officer, the plaintiff, if by the face of the paper or information coming from other sources he knows that this officer indorsed the instrument for the corporation, is, as a matter of law, put upon inquiry as to the authority of the officer to make this particular indorsement. *Ward v. City Trust Co. of New York*, 182 N. Y. 61, 84 N. E. 585 (N. I. L.); *Pelton v. Spider Lake Sawmill & Lumber Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963 (N. I. L.); *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 848 (N. I. L.), *semble*. If, however, a reasonable inquiry would have disclosed facts giving the officer apparent authority to make this particular indorsement, even though such an inquiry be not made by the plaintiff and such facts thus remain unknown to him, the plaintiff, being without actual notice of any breach of authority or any actual bad faith, has been held to be entitled to the proceeds of the instrument as against the corporation. See *Buckley v. Lincoln Trust Co.*, 72 Misc. Rep. 218, 131 N. Y. Supp. 105 (N. I. L.). Compare *Newman v. Newman*, 160 App. Div. 331, 145 N. Y. Supp. 325 (N. I. L.). Frequently the authority of an agent to indorse checks payable to his principal is limited, by the terms of the power of attorney, to indorsing checks for deposit in a particular bank. In such case, unless there are other circumstances giving such agent apparently the authority to indorse paper generally, it would seem that a purchaser would be put on inquiry as to a deviation from the terms of the power. *Fr. Savings Bank v. Int. Trust Co.*, *supra*. But the contrary conclusion was reached in *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873 (N. I. L.), and *Cluet v. Couture*, 140 App. Div. 830, 125 N. Y. Supp. 813 (N. I. L.). See note 44, page 337, *supra*. In the two cases last cited the courts seem to confuse the question, "Has there been a transfer of title?" with the question, "Has the plaintiff, as a matter of law, notice of the defendant's equity, or is he, as a matter of law, guilty of bad faith with respect to that equity?" It will be noted that all the cases thus far cited in this note present questions of agency in the inception and transfer of instruments, and not questions of when a plaintiff has constructive notice of "equities." The following are instances of the latter: The fact that the mayor of a municipality, who signed the bonds in question, payable to bearer, for the municipality, delivered them to the plaintiff as collateral security for a loan to himself, was held not sufficient to make the plaintiff a holder in bad faith as to the defective title of the mayor. *Borough of Montvale v. People's Bank*, 74 N. J. Law, 464, 67 Atl. 67

usual course of business. But these tests mean pretty much the same thing, though it involves a classification a little less exact.

(N. I. L.). Compare *Coleman v. Stocke*, 159 Mo. App. 43, 139 S. W. 216 (N. I. L.). In *Brown v. Miller*, 22 Idaho, 307, 125 Pac. 981 (N. I. L.), the action was by the payee, the receiver of an insolvent bank, against the maker. The defense set up was that a third party had induced the defendant to give the note in payment of such third party's indebtedness to the bank. The undisputed evidence was that the maker handed the note to the plaintiff receiver, intending that it be taken for the indebtedness of the third party, a former officer of the bank. The trial court found that the receiver acted in good faith. But the court held that the receiver had constructive notice of the fraud, saying (22 Idaho, 318, 125 Pac. 985): "It seems to us that the receiver in this case was clearly chargeable with at least constructive notice that Cramer was insolvent, as well as the bank of which he was vice president, director, and managing agent. Good faith, at least, put him on inquiry. The receiver had been in charge of the institution for about 25 days. He had charge of the books of the corporation; he had been in a position to know at least the general condition of the institution—who had been the stockholders, directors, and agents and employés of the institution. He had likewise been in a position to know who were depositors and who were debtors of the institution. He was informed that Cramer was one of the principal owners and the controlling spirit in the institution. He also knew that Cramer was one of the largest debtors of the institution and that this indebtedness was unsecured. * * * These facts were sufficient to put the receiver upon inquiry." The dissenting opinion of Davis, District Judge, seems sound. In *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959 (N. I. L.), it was held that the fact that a note indorsed in blank by the payee was presented by the maker to the plaintiff for discount did not, as a matter of law, put the plaintiff upon inquiry as to the theft of the note by the maker from the payee, since the apparent facts suggested merely an accommodation indorsement. Knowledge that the instrument was given in return for a promise is not constructive notice of a total or partial failure of consideration by reason of the failure to perform that promise. This is especially clear where the failure to perform does not take place until after the transfer. *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88 (N. I. L.); *Whitehead v. Purdy*, 172 Mich. 31, 137 N. W. 684 (date of instrument does not appear and N. I. L. is not cited); *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99 (N. I. L.); *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (N. I. L.); *Hakes v. Thayer*, 165 Mich. 476, 131 N. W. 174; *Bank of Sampson v. Hatcher*, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989 (N. I. L.). And it is true although the breach has already occurred and the plaintiff knows that the time for perform-

"Bona fides or good faith" is a term used as a mere distinction from mala fides or bad faith. If paper be purchased without anything which the law can construe into

ance has passed, at least where the defendant or other party claiming the "equity" was not aware of the breach at the time of transfer. *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 285, 15 Ann. Cas. 665 (N. I. L.); *Dollar Saving & Trust Co. v. Crawford & Ashby*, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587; *Detroit Savings Bank v. Towers*, 42 Pa. Super. Ct. 246 (N. I. L.). And is equally true, although the cases decided under the N. I. L. in support of this proposition are not so numerous, where it is known to the plaintiff that the time for performance has arrived and where inquiry of the defendant or other party claiming the "equity" would, at the time of the transfer, have disclosed the breach of agreement constituting the "equity." *Denton Nat. Bank v. Kenney*, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (N. I. L.). See, however, *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633 (N. I. L.). See, also, *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042 (N. I. L.).

⁴² In most cases of constructive bad faith, if the holder, alleged to be a holder not in due course, has made a reasonable investigation, resulting in the discovery of facts which would have tended to dispel an actual suspicion if one had been aroused, or which did tend to dispel a suspicion actually aroused, the holder is not a holder in bad faith, as a matter of law. This doctrine received a questionable application in *Havana Cent. Ry. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12 (N. I. L.). There several checks were drawn by the treasurer of the plaintiff corporation, to his own order, for amounts too large, under the circumstances, to be salary checks, and deposited them with defendant bank to his individual account, and later exhausted such credit by his individual checks. Such credit was not, however, exhausted until after the defendant had presented the checks to the drawee bank and received payment of them from it. It was held that the absence of actual authority in the treasurer to draw these checks was not sufficient ground for a recovery against the defendant. The court said that, although the defendant bank was put on inquiry, it had made inquiry by presentation to the bank upon which the check was drawn, and that such drawee bank was the agent of the plaintiff corporation to determine whether or not these checks were drawn by it. The actual decision may, perhaps, be sustained upon the ground that the plaintiff corporation had no action against the defendant bank, since the defendant bank did not convert anything belonging to the plaintiff, and since the plaintiff's remedy against the drawee bank seems to have been ample. Whether or not the drawee bank could have recovered from the defendant is a question not raised by the facts of the case. See, also, *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611 (N. I. L.); *Park v. Johnson*,

notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith, and can secure to himself none of the advantages given to the bona fide purchaser. But bad faith means nothing more than participation in the fraud, and resolves itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith.⁴³ "It is predicated," said Chief Justice Church, "upon a variety of circumstances, some of them slight, and others of more significance. A perfectly upright, honest man might sell a bond which had been stolen, and the explanation might prevent even the taint of wrong on his part, while the explanation, although falling far short of proof of actual guilt, might leave upon the mind an apprehension that he either directly or impliedly connived at the wrong, or, at least, that he was willing to deal in securities, and keep his eyes and ears closed, so that he should not ascertain the real truth."⁴⁴ Good faith, then, is absence of knowledge or means of knowledge on the part of the purchaser of the facts which constitute the defense to the instrument.⁴⁵ It is evidenced by the facts of each transaction.

So also the term "due or usual course of business" means "according to the usages and customs of commercial transactions." Negotiable paper is taken in the regular course of business when received in transfer in the manner in which mercantile paper is ordinarily used, and when a business man would ordinarily have received the paper un-

20 Idaho, 548, 119 Pac. 52 (N. I. L.). But where the indorsee of a check knew when he took it that the bank had refused payment of it four times, an inquiry by him of his indorser, resulting in the reply that the payment had been refused for lack of funds and that the drawer had promised to make a sufficient deposit, was held not reasonably thorough. *Frank v. Wolff* (Sup.) 125 N. Y. Supp. 530 (N. I. L.). See, also, *Re Stanford Clothing Co.* (D. C.) 187 Fed. 172, 178 (N. I. L.); *Newman v. Newman*, 160 App. Div. 831, 145 N. Y. Supp. 325 (N. I. L.).

⁴³ *Murray v. Lardner*, 2 Wall. 121, 17 L. Ed. 857.

⁴⁴ *Dutchess County Mut. Ins. Co. v. Hachfield*, 73 N. Y. 228.

⁴⁵ But see note 32, *supra*.

der the circumstances in which it was offered, and have parted with his property for it.⁴⁶ The meaning of this expression has been somewhat discussed by the courts of Iowa.⁴⁷ The view of those courts seems to be that, when a man of ordinary business experience would have been willing to purchase paper circumstanced as the paper was in the cases before them with the expectation of an easy and safe recovery, it was taken in the usual course of business. Thus neither an instrument found unindorsed in the hands of one not the payee and transferred by such holder, nor paper which is overdue, nor a draft in the possession of the acceptor,⁴⁸ nor a bill or note taken by operation of law would be taken in course of business.⁴⁹ For, in the last case, to acquire title by legal process is not in the regular course of dealing in commercial paper. The transferee pays no value for it. He can only be deemed as occupying exactly the position of the person from whom he derived the instrument, because he is in law his representative. It has been held that where the holder has offered to take for a negotiable instrument a sum so small that the only reasonable interpretation could be that there is something wrong about it, it was willful blindness, and an abstinence from inquiry, so great that the court would treat it as bad faith. The reason is that it is in contravention of the habit of business men to sell valuable rights for almost nothing, and the courts deem an act such as this is a necessary implication of fraud. But a modified form of this rule as found in New York courts is probably the true view.⁵⁰ It appeared from the evidence that notes obtained through a gross swindle were bought for half price, but no evidence was offered of the good faith of the plaintiff in buying the

⁴⁶ Edw. Bills & N. § 519.

⁴⁷ Moore v. Moore, 39 Iowa, 461; Trustees of Iowa College v. Hill, 12 Iowa, 462. See section 52, N. I. L., as enacted in Wisconsin. St. Wis. 1911, § 1676—22.

⁴⁸ Central Bank of Brooklyn v. Hammett, 50 N. Y. 153. But see Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959 (N. I. L.), stated in note 41, supra.

⁴⁹ Briggs v. Merrill, 58 Barb. (N. Y.) 399.

⁵⁰ Vosburgh v. Diefendorf, 48 Hun, 619, 1 N. Y. Supp. 58; Richmond v. Diefendorf, 51 Hun, 537, 4 N. Y. Supp. 375.

notes, and it was held that good faith under such a purchase was not presumed, but the plaintiff must show his good faith. Soon afterwards the same point came up in a little different form, and, the plaintiff showing by the evidence his good faith, it was held he was entitled to recover. Thus, the New York courts hold what seems the wiser doctrine, that the smallness of the consideration is a circumstance of suspicion which throws the burden of proof on the holder. But it is not conclusive evidence of notice. It is merely evidence which, if undenied, will destroy the bona fides of the transaction.⁵¹ And it is for the jury to finally decide whether or not the purchaser had such knowledge of the fraud that his purchase of the instrument was a participation in it.⁵²

There are two principles to be added to the discussion of the general doctrine of notice. They are: (1) Notice to the purchaser, actual or constructive, must exist at the time of the acquirement of the paper for value; and that (2) notice does not destroy the equities of a purchaser if he in turn is the transferee of a purchaser for value without notice. In regard to the first of these rules, the element of value determines the comparative superiority of the equities of the purchaser and the prior party suffering through fraud or wrong. For unless the purchaser has parted with value for the instrument he has acquired, he is in no worse position than if he had not acquired the instrument at all. If, therefore, before he has parted with value, he receives notice of the defenses of a prior party, according to the well-settled doctrines of equity already referred to he takes in subordination to the prior party's rights. But the payment of a valuable consideration changes the balance of the equities in his favor, and his right to a superior equity becomes fixed, and can be at all times asserted. He is then equipped with all the rights of a bona fide purchaser.⁵³

⁵¹ See note 32, *supra*.

⁵² *Potts v. Mayer*, 74 N. Y. 594.

⁵³ *Weaver v. Barden*, 49 N. Y. 286; *De Mott v. Starkey*, 3 Barb. Ch. (N. Y.) 403; *Crandall v. Vickery*, 45 Barb. (N. Y.) 156. This is true, provided that the purchaser has gotten in the legal title before he receives notice. See note 1, *supra*. See, also, *Wright v. Mississ-*

And so it is that knowledge of the fraud or wrong suffered by prior parties brought home to the purchaser after the transfer to him for a valuable consideration cannot shake the title he has acquired on his purchase.⁵⁴ And this rule goes to the extent that if a valuable consideration is partly paid and partly unpaid, the purchaser is to be protected to the amount which he has in good faith paid,⁵⁵ because his equity is to that extent superior to that of the prior party. The reason for the second rule is that the purchaser for value without notice, when he transfers the instrument, transfers without reservation all the rights he has in it. The transferee acquires all these rights. And if such a transferee could have maintained an action upon the bill or note, the purchaser from him is not affected by notice of the defenses of prior parties. And subsequent notice of the defect to the transferee cannot affect the right of action upon the paper any more than subsequent notice of any equity to the transferee.⁵⁶

sippi Valley Trust Co., 144 Mo. App. 640, 129 S. W. 407 (N. I. L.); Murchison v. Nies, 87 Kan. 77, 123 Pac. 750 (date of instrument does not appear—no reference to N. I. L.).

⁵⁴ Hoge v. Lansing, 35 N. Y. 136; Howard Banking Co. v. Welchman, 6 Bosw. (N. Y.) 280; Perkins v. White, 36 Ohio St. 530; Woodworth v. Huntoon, 40 Ill. 131, 89 Am. Dec. 340, Johns. Cas. Bills & N. 150.

⁵⁵ Dows v. Kidder, 84 N. Y. 121; Dresser v. Missouri & I. R. Const. Co., 93 U. S. 93, 23 L. Ed. 815, Johns. Cas. Bills & N. 187. This was a case where partial payment only had been made when notice of fraud was given, and payment prohibited. It was held by Justice Hunt that: "The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a bona fide purchaser." Hubbard v. Chapin, 2 Allen (Mass.) 328; Lay v. Wissman, 36 Iowa, 309; N. I. L. § 54. For an attempted explanation of this rule, see note 6, supra.

⁵⁶ Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; Miller v. Talcott, 54 N. Y. 114; Farmers' & Citizens' Nat. Bank v. Noxon, 45 N. Y. 762; Chalmers v. Lanion, 1 Camp. 383. This was an action by the second indorsee against the acceptor of a bill of exchange. It was held that if the person who indorsed the bill to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plain-

PRESUMPTION AND BURDEN OF PROOF— ORDER OF PROOF

128. The holder of a bill or note is, in the first instance, presumed to be a holder for value and without notice; but, if it is proved on the trial that the bill or note, in its issue or negotiation, was affected by the defenses hereinafter specified, it is incumbent for the holder to prove that he is such a purchaser.

tiff after it had become due. *Masters v. Ibberson*, 8 C. B. 100; *May v. Chapman*, 16 Mees. & W. 355; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210; *Scotland County v. Hill*, 132 U. S. 117, 10 Sup. Ct. 26, 33 L. Ed. 261; *Verbeck v. Scott*, 71 Wis. 63, 36 N. W. 600; *Shaw v. Clark*, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474; *Suffolk Sav. Bank v. City of Boston*, 140 Mass. 365, 21 N. E. 665, 4 L. R. A. 516; *Riley v. Shawacker*, 50 Ind. 592; *Mornyer v. Cooper*, 35 Iowa, 257; *Hascall v. Whitmore*, 19 Me. 102, 36 Am. Rep. 738; *Woodworth v. Huntoon*, 40 Ill. 131, 89 Am. Dec. 340; *Bassett v. Avery*, 15 Ohio St. 299; N. I. L. § 58; *Comstock v. Buckley*, 141 Wis. 228, 124 N. W. 414, 135 Am. St. Rep. 34 (N. I. L.); *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655 (N. I. L.); *R. T. & B. F. Camp Lumber Co. v. State Sav. Bank*, 59 Fla. 455, 51 South. 543 (N. I. L.); *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (N. I. L.). In *Horan v. Mason*, 141 App. Div. 89, 125 N. Y. Supp. 668 (N. I. L.), it appeared that notes were made by the defendant to a corporation and indorsed by the corporation to the plaintiff, the president of such corporation, for value; the plaintiff indorsed the notes to a bank for full value; at maturity, the defendant not having paid the notes, the plaintiff paid their amounts to the bank and received back the notes. There was evidence that the plaintiff, when the notes were negotiated to him, knew such facts that he had either actual or constructive notice of the fraud of the payee corporation in inducing the defendant to make the notes. The appellate court held that it was error for the trial court not to have directed a verdict for the plaintiff, on the ground that he acquired the title of the bank. This conclusion seems unsound, since, if the plaintiff had actual or constructive notice of the fraud before he negotiated the instrument to the bank, he was guilty of a breach of a constructive trust in negotiating the instrument to the bank. The court relied upon section 58, N. I. L., and said (141 App. Div. at page 92, 125 N. Y. Supp. at page 670): "In the case at bar the plaintiff was not the payee of the note and the exception to the general rule cannot apply as against him, as he did not personally participate in any fraud connected with the making

129. The usual order of proof on a trial is:

- (a) To produce the paper sued on.
- (b) To prove the signatures of the defendant and of all persons whose indorsement is necessary to establish the plaintiff's title.
- (c) To prove, as against the drawer or indorsers, presentation, demand, dishonor, and notice of dishonor to them, or circumstances to excuse these acts.

130. Upon proof of the facts specified in the foregoing section, the holder may rest for his recovery until evidence is adduced showing:

- (a) That the holder when he took the paper had notice of the equities.
- (b) Or that there was fraud, duress, or illegality in the issue or subsequent negotiation of the instrument.

and delivery of the note, even though he might be chargeable with actual or constructive notice of it." See Central Nat. Bank v. Ericson, 92 Neb. 396, 138 N. W. 563 (N. I. L.); Berenson v. Conant, 214 Mass. 127, 101 N. E. 60 (N. I. L.); Bute v. Williams (Tex. Civ. App.) 162 S. W. 989. Section 26, N. I. L., provides: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." Since section 58 provides that a holder deriving title from a holder in due course is a holder in due course, unless he was a party to the fraud or illegality affecting the instrument, section 26 seems unnecessary, except perhaps to cure the effect of a literal construction of section 29, which implicitly provides that an accommodation party is liable only to a holder for value. See Lehrenkrauss v. Bonnell, 199 N. Y. 240, 92 N. E. 637 (N. I. L.). Section 26 was referred to, but not interpreted, in Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supn. 1042 (N. I. L.); Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49 (N. I. L.); Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925 (N. I. L.); Re Hopper-Morgan Co. (D. C.) 154 Fed. 249 (N. I. L.); Campbell v. Fourth Nat. Bank of Cincinnati, 137 Ky. 555, 126 S. W. 114 (N. I. L.); National Bank of Commerce in St. Louis v. Morris, 156 Mo. App. 43, 135 S. W. 1008 (N. I. L.). Certainly section 26 should not be literally construed so as to reach this result: A plaintiff, innocent as to fraud in the inception of the instrument, receives the instrument as a gift from an indorsee who acquired the instrument for value, but with notice of the fraud. If the plaintiff must be deemed a holder for value as to parties prior to his indorsee who paid value, he must be deemed a holder in due course.

131. Upon proof of facts specified last above, the purchaser must show that he or some person under whom he claims was a purchaser for value without notice.

It is the purpose of this section to show the application of the rules set forth in this and the foregoing chapter in their actual administration in courts of law. These two chapters have attempted to show that, where negotiable instruments are negotiated to a third person, certain defenses will not be allowed to be interposed against him in his action upon the instrument, provided he is a purchaser for value and without notice. In asserting the instrument as a legal right, and enforcing it in court, these principles take the form of presumptions of evidence.⁵⁷ This may be made clearer, perhaps, if the meaning of a presumption is elaborated by showing its application. It must be kept in mind that a court is, so to speak, an invention or machine

⁵⁷ The burden and order of proof must, of course, depend upon the pleadings and the issue raised. Ordinarily, the declaration or complaint is upon the instrument itself, varying in form according to the parties by or against whom the action is brought. The declaration describes the instrument, and sets forth in substance how the defendant became a party, and his contract, the mode by which the plaintiff derived his interest in and right of action on the instrument, and the breach of the defendant's contract. Chit. Bills (8th Ed.) 578. At common law, in an action between immediate parties, it was usual to declare not only on the instrument itself, but also on the original consideration; the practice being to declare on the money counts, and give the instrument in evidence under them, if adapted to the consideration. But this did not apply where there was no privity between the plaintiff and the defendant, as between indorsee and acceptor or maker. Chit. Bills (8th Ed.) 593, 594. *Whitwell v. Bennett*, 3 Bos. & P. 559; *Waynam v. Bend*, 1 Camp. 175; *Eales v. Dicker*, Moody & M. 324; *Pierce v. Crafts*, 12 Johns. (N. Y.) 90. In the United States the doctrine has been extended to suits between other than immediate parties, and it has frequently been held that under the counts for money lent, money paid, and money had and received the holder might recover against the acceptor or a remote indorser. *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316; *Pierce v. Crafts*, *supra*; *Penn v. Flack*, 3 Gill & J. (Md.) 369; *Tenney v. Sanborn*, 5 N. H. 557; *Howes v. Austin*, 35 Ill. 396; *Edw. Bills & N.* (3d Ed.) § 933; 2 Ames Cas. Bills & N. 539, note 1, 874. It seems that the form of action did not affect the rights of the parties, nor lessen the proof required to establish the plaintiff's right to recovery. *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Edw. Bills & N.* (3d Ed.) § 934.

for administering justice; and that to put this machine in motion it is necessary to bring the facts constituting a wrong to the notice of a judge and jury by written evidence or the sworn testimony of persons who have seen or known the facts to be proved. If these facts are undenied, or controverted and proved, the court then administers a remedy. But this the court of law can only do, and the machinery of justice can only be set in motion, when the facts constituting a violated right are brought before it by competent evidence. Until that time the courts sit idly by, awaiting facts demonstrating affirmatively that some one has been wronged. These facts must be proved in extenso by the person prosecuting the remedy, or the plaintiff. In case of negotiable bills and notes, most of the affirmative proof necessary to establish other kinds of contracts is unnecessary, because the court, upon the production of the instrument, assumes certain facts as proved sufficiently to entitle the plaintiff to judgment, unless the defendant seeks to disprove them. So that in the first stage of the plaintiff's case the court, upon production of the instrument, assumes as proved and acts upon the following facts as true:

- (1) That there was a sufficient consideration for the promise or order or transfer, whether the receipt of a consideration was stated or not.⁵⁸
- (2) That there was such a delivery of the instrument as is necessary to its legal inception.⁵⁹
- (3) That the written terms of the instrument state the facts as therein set forth, the date showing the time of execution⁶⁰ and fixing the time of payment;⁶¹ the terms of payment⁶² both as to its amount⁶³ and as to its place.

⁵⁸ Olsen v. Ensign, 7 Misc. Rep. 682, 28 N. Y. Supp. 38; Bottum v. Scott, 11 N. Y. St. Rep. 514; Anthony v. Harrison, 14 Hun (N. Y.) 198, affirmed 74 N. Y. 613; Andrews v. Chadbourne, 19 Barb. (N. Y.) 147.

⁵⁹ Sawyer v. Warner, 15 Barb. (N. Y.) 282.

⁶⁰ Breck v. Cole, 4 Sandf. (N. Y.) 80; Germania Bank v. Distler, 4 Hun (N. Y.) 633; 1 Pars. Bills & N. 41.

⁶¹ Joseph v. Bigelow, 4 Cush. (Mass.) 82-84.

⁶² Walker v. Clay, 21 Ala. 797; Blakemore v. Wood, 3 Snead (Tenn.) 470.

⁶³ Norwich Bank v. Hyde, 13 Conn. 282. Pars. Bills & N. 333-338; Abb. Tr. Ev. 411.

(4) Possession by the holder in case of an instrument payable to bearer, or indorsed in blank, or, in case of an indorsement in full, possession by the indorsee, presumes title upon a good consideration.⁶⁴

(5) That the instrument is unpaid.⁶⁵

(6) That in case of an undated indorsement the transfer and indorsement were made before the maturity of the instrument and without notice.⁶⁶ Thus the instrument itself is proof of most of the preliminary facts necessary to establish a right of action, and it remains to authenticate it as a valid instrument.

Having once produced the paper with these presumptions attached to it, it becomes necessary for this purpose to prove the following facts:

(1) If the action is by the payee against the maker or acceptor, prove the maker's or acceptor's signature.⁶⁷ It

⁶⁴ James v. Chalmers, 6 N. Y. 209; Kidder v. Horrobin, 72 N. Y. 159. In PEACOCK v. RHODES, 2 Doug. 633, Moore Cases Bills and Notes, 1, it was held that, where a bill of exchange with a blank indorsement had been stolen and negotiated, the innocent indorsee might recover on it. In Price v. Neal, 3 Burrows, 1355, it was held that an innocent indorsee could not be compelled to refund the money paid to him on a forged acceptance. If a bill of exchange be drawn in favor of a fictitious payee, and that circumstance be known as well to the acceptor as the drawer, and the name of such payee be indorsed on the bill, an innocent indorsee for a valuable consideration may recover on it against the acceptor, as on a bill payable to bearer. Minet v. Gibson, 3 Term R. 481. If A deposit bills, indorsed in blank, with B, his banker, to be received when due, and the latter raise money upon them by pledging them with C, another banker, and afterwards become bankrupt, A cannot maintain trover against C. for the bills. Collins v. Martin, 1 Bos. & P. 648. And see Mechanics' Bank of New York City v. Straiton, *42 N. Y. 365.

⁶⁵ McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Daniel, Neg. Inst. § 1200.

⁶⁶ Hendricks v. Judah, 1 Johns. (N. Y.) 319; Andrews v. Chadbourne, 19 Barb. (N. Y.) 147; Lewis v. Lady Parker, 4 Adol. & E. 838; Parkin v. Moon, 7 Car. & P. 408; New Orleans Canal & Banking Co. v. Montgomery, 95 U. S. 16, 24 L. Ed. 346; Leland v. Farnham, 25 Vt. 553; Mason v. Noonan, 7 Wis. 609; Mobley v. Ryan, 14 Ill. 51, 56 Am. Dec. 488; Webster v. Calden, 56 Me. 204.

⁶⁷ Edw. Bills & N. § 465; Abb. Tr. Ev. p. 391. In many states proof of the defendant's signature is dispensed with unless put in issue by denial supported by affidavit. Daniel, Neg. Inst. § 1219.

is unnecessary to prove a demand of the maker or acceptor because the suit is itself a sufficient demand.⁶⁸

(2) In an action brought by an indorsee against the acceptor or maker, the holder must prove the signature of the defendant and also of the payee.⁶⁹ The proof of the latter signature is not for the purpose of fixing the liability of the payee, but of proving that the title is in the holder.⁷⁰

(3) In an action against an indorser of a bill or note, the plaintiff need not prove the signature of the maker,⁷¹ drawer,⁷² or prior indorsers, because, on proof of the defendant's signature, the indorser is deemed to warrant that of the prior indorsers.⁷³ In such case it is necessary to prove only the signatures of the persons sought to be re-

⁶⁸ *Green v. Goings*, 7 Barb. (N. Y.) 652.

⁶⁹ Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as drawer; and therefore an indorsee may bring evidence to show that the signatures of the drawer, to the bill and to the first indorsement, are in the same handwriting. *Cooper v. Meyer*, 10 Barn. & C. 468. In *Robinson v. Yarrow*, 7 Taunt 455, it was held that the acceptance of a bill drawn by procuration admits the drawer's handwriting, and the procuration to draw. In an action by the indorsee against the acceptor of a bill of exchange, the witness called to prove the handwriting of the drawer stated that neither the drawing nor indorsement were of the handwriting of the person whose they purported to be. But it was proved that the defendant had acknowledged the acceptance to be his, and it was contended that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and indorsement were of the same handwriting. It was held necessary, however, that some proof should be given as to whose the handwriting was. *Allport v. Meek*, 4 Car. & P. 287. A bill purporting to be drawn by B. & W. (a real firm), payable to their order, and indorsed by them, was negotiated by the acceptor with that indorsement upon it. Both drawing and indorsement were forgeries. It was held that if the bill was accepted, and negotiated by the acceptor with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing, by B. & W. *Beeman v. Duck*, 11 Mees. & W. 251.

⁷⁰ *Coggill v. American Exch. Bank*, 1 N. Y. 115, 49 Am. Dec. 310; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287.

⁷¹ *Dalrymple v. Hillenbrand*, 62 N. Y. 5, 20 Am. Rep. 438.

⁷² *Rosc. N. P. Ev.* 381-399.

⁷³ *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523.

covered against and of persons whose indorsement is necessary to establish the plaintiff's title.

(4) In case of a note or bill payable in blank or to bearer, no proof of title by proving signatures of indorsers is necessary;⁷⁴ but, where it is sought to recover against a party from whom title is derived through special indorsements, the signatures of special indorsers must be proved.⁷⁵

(5) Where the recovery is sought against a drawer⁷⁶ or an indorser or indorsers,⁷⁷ the plaintiff, in addition to this fact, must prove that the paper was duly presented and dishonored, and that due notice thereof was given to the defendant.⁷⁸

The plaintiff having established all that it necessary to entitle him to judgment, it becomes incumbent upon the defendant to prove his defense, which he does by proving in extenso whatever facts may constitute it. And here the presumptions vary accordingly as the action is between immediate parties or between a remote party and a bona fide holder. In case of an action litigated between immediate parties, the general rule is that the evidence produced upon the various issues is governed by the rules governing the production and establishment of those issues in case of ordinary contracts. But where the litigation is between a purchaser for value and a prior party, the further evidence depends upon whether the facts proved by the defendant are those constituting a real defense or a personal defense. If the defense is a real defense, the character of a purchaser for value without notice cannot avail the holder, and the question to be established is solely whether the real defense does or does not exist and is established according to the process in ordinary cases of contract. But where the defense is a personal one the cases divide themselves into two classes, and these are: (1) Cases where the defense proved shows lack or failure of consideration; (2) cases where the

⁷⁴ James v. Chalmers, 6 N. Y. 209. See, also, *supra*, p. —.

⁷⁵ Smith v. Chester, 1 Term R. 654. See *supra*, p. —.

⁷⁶ Shultz v. Depuy, 3 Abb. Prac. (N. Y.) 252.

⁷⁷ Clift v. Rodger, 25 Hun (N. Y.) 39.

⁷⁸ Conkling v. Gandal, 1 Abb. Dec. 423. Post, p. 468 et seq., *infra*.

defense proved shows fraud, duress,⁷⁹ or the illegality of consideration in the inception of the instrument. In the first class of cases the general presumption prevails that the indorsee of a negotiable bill or note is a bona fide holder for value.⁸⁰ This presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration,⁸¹ or that the consideration failed,⁸² or was made, indorsed, or accepted by one for the sole accommodation of the other.⁸³ When no other proof is given, the holder is not bound to prove a valuable consideration. Thus, unless the defendant proves that the plaintiff had notice of the fact of such want or failure of

⁷⁹ In an action by the indorsee against the drawer of a bill of exchange, if it appears that the defendant drew the bill without consideration, and under duress, it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it came due. *Duncan v. Scott*, 1 Camp. 100.

⁸⁰ *Ross v. Bedell*, 5 Duer (N. Y.) 462; *Case v. Mechanics' Banking Ass'n*, 4 N. Y. 166. N. I. L. § 59, seems in accord. Section 55 defines what makes the title of a holder defective within the meaning of section 59. Want or failure of consideration does not cause a defect of title, unless the failure of the consideration due from a party takes place and is known to him before he negotiates the instrument, in which case he would be guilty of a breach of faith in negotiating the instrument to the plaintiff. *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043 (N. I. L.), semble; *Joveshof v. Rockey*, 58 Misc. Rep. 559, 109 N. Y. Supp. 818 (N. I. L.); *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (N. I. L.); *Hill v. Dillon* (Mo. App.) 161 S. W. 881 (N. I. L.); *First Nat. Bank v. McNairy* (Minn.) 142 N. W. 139. Compare *Jobes v. Wilson*, 140 Mo. App. 281, 124 S. W. 548 (N. I. L.); *Johnson County Sav. Bank v. Mills*, 143 Mo. App. 265, 127 S. W. 425 (N. I. L.); *Birch Tree State Bank v. Dowler*, 163 Mo. App. 65, 145 S. W. 843 (N. I. L.); *Ireland v. Shore*, 91 Kan. 326, 137 Pac. 926.

⁸¹ "The maker of a negotiable instrument is not allowed to impair its value in the hands of a bona fide holder by denying the existence of a consideration or by otherwise showing that it is not what it purports to be." Lewis, J., in *Lennig v. Ralston*, 28 Pa. 137.

⁸² *Mechanics' & Traders' Nat. Bank of City of New York v. Crow*, 60 N. Y. 85.

⁸³ *HARGER v. WORRALL*, 69 N. Y. 370, Moore Cases Bills and Notes, 142. But it is error to exclude evidence of the negotiation of accommodation paper for a purpose other than that for which it was given, on the ground that the defendant must first show that the plaintiff was not a holder in due course. *Kennedy v. Spilka*, 72 Misc. Rep. 89, 129 N. Y. Supp. 390 (N. I. L.).

consideration or of the payment or discharge of the bill or note, or proves that for some reason the plaintiff is not a bona fide holder for value,⁸⁴ then these facts are irrelevant, and the defense will not be received. But if the defendant first proves by evidence sufficient to go to the jury that the transfer to the plaintiff was in bad faith,⁸⁵ or without value,⁸⁶ he may then prove the facts of his defense. On such proof by the defendant it becomes incumbent on the plaintiff to prove that he is a holder in good faith and for value. And if he cannot prove this, he must disprove the facts of the defendant's defense, or else he cannot recover.

Cases where the defense is fraud or illegality of consideration are distinguished from the defenses first mentioned in that their proof by the defendant changes the presumption that the holder is one in good faith and for value, and throws the burden of proving these facts in the first instance upon the plaintiff. It being shown that the bill or note, or the transfer thereof, is tainted with fraud or illegality, the assumption is that the holder is a partaker in the fraud or illegality, and he must prove that he is not. In the often-quoted case of *Duncan v. Scott*,⁸⁷ where a bill was given by the defendant under coercion and fear of death, Lord Ellenborough said: "It is incumbent upon the plaintiff to give some evidence of consideration;" and this principle has been followed in many cases in England, and in most of the states of the United States.⁸⁸ It has been explained to mean that a plaintiff suing upon a negotiable

⁸⁴ *Brookman v. Millbank*, 50 N. Y. 378; *Abb. Tr. Ev.* 441; *Wright v. Irwin*, 33 Mich. 32; *Gray v. Bank of Kentucky*, 29 Pa. 365; *Wilson v. Lazier*, 11 Grat. (Va.) 478; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570, 47 N. E. 241.

⁸⁵ *Smith v. Sac County*, 11 Wall. 139-147, 20 L. Ed. 102.

⁸⁶ *First Nat. Bank of Cortland v. Green*, 43 N. Y. 298; *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170.

⁸⁷ (1807) 1 Camp. 100.

⁸⁸ *CLARK v. PEASE*, 41 N. H. 414, *Moore Cases Bills and Notes*, 152; *Paton v. Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192; *Kellogg v. Curtis*, 69 Me. 212, 31 Am. Rep. 273; *Smith v. Livingston*, 111 Mass. 342; *National Bank of North America v. Kirby*, 108 Mass. 497; *Rock Island Nat. Bank v. Nelson*,

note or bill purchased before maturity is presumed, in the first instance, to be a bona fide holder.⁵⁹ But when the ac-

41 Iowa, 563; *Reamer v. Bell*, 79 Pa. 292; *Bailey v. Bidwell*, 13 Mees. & W. 73; *Harvey v. Towers*, 6 Exch. 656; *Smith v. Braine*, 16 Q. B. 244.

⁵⁹ **KERR v. ANDERSON**, 16 N. D. 36, 111 N. W. 614 (N. I. L.), *Moore Cases Bills and Notes*, 223. Section 59, N. I. L., provides in part: "Every holder is deemed prima facie to be a holder in due course." Section 26 provides: "When value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." Section 45 provides: "Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue." But these presumptions do not help the holder if there is evidence from which fraud or illegality or breach of faith, constituting a defect in the title of a prior party, can reasonably be found. *German-American Bank of Rochester v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836 (N. I. L.); *Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508 (N. I. L.); *Merchants' etc., Bank v. Bank* (Miss.) 84 South. 210. In such case the plaintiff holder must by evidence satisfy the jury that he purchased for value and in good faith. N. I. L. § 59; *Stouffer v. Alford*, 114 Md. 110, 78 Atl. 387 (N. I. L.); *Bolen v. Wright*, 89 Neb. 116, 131 N. W. 185 (N. I. L.); *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302 (N. I. L.); *Johnson County Sav. Bank v. Gregg*, 51 Colo. 358, 117 Pac. 1003 (N. I. L.); *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884 (N. I. L.); *Bank of Ozark v. Hanks*, 142 Mo. App. 110, 125 S. W. 221 (N. I. L.); *Hill v. Dillon* (Mo. App.) 161 S. W. 881 (N. I. L.); *Cox v. Chine*, 139 Iowa, 128, 117 N. W. 48 (N. I. L.); *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638 (N. I. L.); *City Deposit Bank v. Green*, 138 Iowa, 156, 115 N. W. 893 (N. I. L.); *Stotts v. Fairfield* (Iowa) 145 N. W. 61 (N. I. L.); *Campbell v. Fourth Nat. Bank of Cincinnati*, 137 Ky. 555, 126 S. W. 114 (N. I. L.); *Muir v. Edelen*, 156 Ky. 212, 160 S. W. 1048 (N. I. L.); *Johnson Co. Sav. Bank v. Mendell*, 36 App. D. C. 413 (N. I. L.); *Wilson v. Kelso*, 115 Md. 162, 80 Atl. 895 (N. I. L.); *Christina v. Custiano*, 129 La. 873, 57 South. 157 (N. I. L.); *Chadwick v. Kirkman*, 159 N. C. 259, 74 S. E. 968 (N. I. L.); *Fidelity Trust Co. v. Whitehead* (N. C.) 80 S. E. 1065 (N. I. L.); *Hawse v. First Nat. Bank of Piedmont*, 113 Va. 588, 75 S. E. 127 (N. I. L.); *Mills v. Keep* (D. C.) 197 Fed. 360 (N. I. L.); *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907 (N. I. L.); *Midwood Park Co. v. Baker* (Sup.) 128 N. Y. Supp. 954 (N. I. L.); *Jacobus v. Jamestown Mantel Co.*, 149 App. Div. 356, 134 N. Y. Supp. 418 (N. I. L.); *Waxberg v. Stappler*, 83 Misc. Rep. 78, 144 N. Y. Supp. 608 (N. I. L.); *Ostenberg v. Kavka* (Neb.) 145 N. W. 713 (N. I. L.). See *First Nat. Bank of Lumberton v. Brown*, 160 N. C. 23, 75 S. E. 1086 (N. I. L.); *Tinker v. Midland Valley Merc. Co.*, 231 U. S. 681, 34

ceptor or maker has shown the bill or note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circum-

Sup. Ct. 252, 58 L. Ed. —. But see *Callendar Sav. Bank v. Loos*, 142 Iowa, 1, 120 N. W. 317 (N. I. L.); *Ham v. Merritt*, 150 Ky. 11, 149 S. W. 1131 (N. I. L.). In other words he must by the preponderance of the evidence satisfy the court or jury that he paid value in good faith. *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (N. I. L.); *Louis De Jonge & Co. v. Woodport Hotel & Land Co.*, 77 N. J. Law, 233, 72 Atl. 489 (N. I. L.); *Schultheis v. Sellars*, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210 (N. I. L.); *Link v. Jackson*, 158 Mo. App. 63, 139 S. W. 588 (N. I. L.); *Leavitt v. Thurston*, 38 Utah. 351, 113 Pac. 77 (N. I. L.). In the case last cited the court said (38 Utah, 353, 113 Pac. 78, 79): "Whenever the existence of any fact or facts is necessary in order that a party may make out his case or establish a defense, the burden of proof—the onus probandi—is on such party to show the existence of such fact or facts. That burden does not shift and is unaffected by the evidence as the trial proceeds. After all the evidence is in, the one having the burden will lose unless the evidence bears more heavily in his favor. Upon proof of fraud in the inception of the note, the statute undoubtedly casts upon the holder, not only the mere duty or burden of proceeding or of going forward, but the burden of establishing the existence of facts showing that he, or some person under whom he claims, acquired title as a holder in due course, * * * which includes the fact that at the time the note was negotiated he, or the person from whom he acquired title, had no notice of the fraud or infirmity." And where the action is not on the instrument, but is to recover back money from a holder to whom a note has been paid under mistake (by the maker who has paid the forged note, thinking it genuine), the burden is, under section 59, N. I. L., on the defendant holder to show that he was a holder in due course. *Jones v. Miners' & Merchants' Bank*, 144 Mo. App. 428, 128 S. W. 829 (N. I. L.). Accordingly it was clearly error for the court to instruct the jury that the burden was on the defendant to prove, not only the illegal consideration charged, but also that the plaintiff had actual notice thereof, or that he purchased after maturity. So it is error to direct a verdict for the plaintiff upon undisputed evidence showing only legal title in the plaintiff where there is evidence sufficient to sustain a finding by the jury that the instrument, as against the defendant, was illegal or procured by fraud. *Tredick v. Walters*, 81 Kan. 828, 106 Pac. 1067 (N. I. L.); *City Nat. Bank of Lafayette v. Mason*, 58 Wash. 492, 108 Pac. 1071 (N. I. L.); *Gottstein v. Simmons*, 59 Wash. 178, 109 Pac. 596 (N. I. L.); *Altschul v. Rogers*, 22 Idaho, 512, 126 Pac. 1048 (N. I. L.). So it is, of course, error for the trial court to exclude evidence of negotiation by the payee to the plaintiff in breach of faith on the ground that evidence must first be introduced to show that the plaintiff was not a holder in due course. *Ginsberg v. Schurman*, 71 Misc. Rep. 463,

stances and for what value he became a holder.⁹⁰ The reason for this rule is that, where there is fraud, it is but reasonable to suppose that he who is guilty of it will part

128 N. Y. Supp. 653 (N. I. L.). So, also, it is error for the court to instruct the jury that the plaintiff, by introducing evidence tending to show purchase by him for value and in good faith, has restored his *prima facie* case. *American Nat. Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738 (N. I. L.). It has been said "that, where general proof is made by the holder of a note that he received the same before maturity in good faith and for value, it then devolves upon the maker to prove that the holder had actual notice of the specific facts claimed to render the note invalid." *Reeves & Sons v. Letts*, 143 Mo. App. 196, 128 S. W. 246 (N. I. L.); *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102 (N. I. L.); *German Am. Bank v. Lewis* (Ala. App.) 63 South. 741 (N. I. L.). These statements are correct only if construed as saying that, if the defendant has introduced no evidence tending to show that value was not paid or that the transfer was not taken in good faith, and the evidence introduced by the plaintiff so strongly tends to show a transfer for value and in good faith that no other conclusion of fact could reasonably be reached, a verdict should be directed for the plaintiff. *Hill v. Dillon*, 151 Mo. App. 88, 131 S. W. 728 (N. I. L.). See *Link v. Jackson*, 158 Mo. App. 63, 139 S. W. 588 (N. I. L.). Accordingly a verdict for the defendant may be sustainable, although there is no direct evidence of bad faith or absence of value in the transfer, on the part of the plaintiff. *Myers v. Petty*, 153 N. C. 462, 69 S. E. 417 (N. I. L.). See *Cedar Rapids Nat. Bank v. Myhre Bros.*, 57 Wash. 596, 107 Pac. 518 (N. I. L.); *Re Hill* (D. C.) 187 Fed. 214 (N. I. L.); *Leavitt v. Thurston*, 38 Utah, 351, 113 Pac. 77 (N. I. L.). In *Second Nat. Bank of Pittsburg v. Hoffman*, 229 Pa. 429, 78 Atl. 1002 (N. I. L.), it was held error for the trial court to direct a verdict for the plaintiff, where the only direct testimony bearing on the question of good or bad faith on the part of the plaintiff in taking the transfer was that of the plaintiff's cashier,

⁹⁰ See cases cited in note 89, *supra*. Where, however, the defendant shows, not any fraud or illegality in the inception of his obligation, but only fraud or illegality in a subsequent transfer, the burden is not upon the plaintiff holder to show that he is a holder in due course, although there is authority for the proposition that, if the defendant shows notice on the part of the plaintiff of such fraud or illegality in the subsequent transfer, he is entitled to a verdict. *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331 (N. I. L.); *Kinney v. Kruse*, 28 Wis. 183, *semble*. But see *Parsons v. Utica Cement Mfg. Co.*, 80 Conn. 58, 66 Atl. 1024; *Parsons v. Utica Cement Mfg. Co.*, 82 Conn. 333, 73 Atl. 785, 135 Am. St. Rep. 278. See comments on these decisions in *Brannan, Anno. N. I. L.* (2d Ed.) 71-2. See, also, pp. 315, 397, *supra*.

with the instrument for the purpose of enabling some third party to recover upon it. Such presumption operates against the holder,⁹¹ and devolves upon him the duty of showing value and lack of notice in rebuttal of the duress or fraud in order to maintain his action.⁹² In the cases of illegality the rule is the same, and for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show he had lack of notice, but need only show value,⁹³ because the burden of

who negotiated the transfer to the bank, and whose testimony tended only to show good faith and payment of value by the plaintiff. Accord: *Park v. Exum*, 156 N. C. 228, 72 S. E. 309 (N. I. L.). But a contrary conclusion was reached in *Eisenberg v. Lefkowitz*, 142 App. Div. 569, 127 N. Y. Supp. 595 (N. I. L.). In that case the trial court struck out evidence tending to show fraud of the payee upon the maker and then directed a verdict for the plaintiffs upon the ground that the evidence of good faith and payment of value was so strong that no other inference could reasonably be drawn. The only direct testimony as to good faith was that given by the plaintiff. Judgment on this directed verdict was affirmed. Laughlin, J., dissenting. The court said (142 App. Div. 575, 127 N. Y. Supp. 600): "Considering all the facts proved and the legitimate inferences to be drawn from them, and the failure of any attempt to contradict or impeach these witnesses, I think that the fact of the plaintiffs' being bona fide holders for value was established by uncontradicted evidence, and the court was therefore correct in striking from the record the testimony of the arrangement between the maker and the payee." In *Ham v. Merritt*, 150 Ky. 11, 149 S. W. 1131 (N. I. L.), the only evidence as to good faith was the testimony of the plaintiff and of the fraudulent payee, who transferred the instrument to the plaintiff. This evidence showed that the plaintiff paid but one-third of its face value for the note. A judgment dismissing plaintiff's petition was reversed, the court saying: "There being an entire want of evidence to show that Ham had notice of any infirmity in the note, the judgment dismissing his petition was unauthorized." See note 94, *infra*, and statement in text.

⁹¹ But evidence tending to show fraud on the part of the payee in inducing the inception of the note is not, as such, any evidence of bad faith on the part of transferee of such payee, although it does change the burden of proof. *Vaughn v. Johnson*, 20 Idaho, 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816 (N. I. L.).

⁹² *First Nat. Bank of Cortland v. Green*, 43 N. Y. 298; *Wilson v. Rocke*, 58 N. Y. 642; *HARGER v. WORRALL*, 69 N. Y. 370, 25 Am. Rep. 206, *Moore Cases Bills and Notes*, 142.

⁹³ *Jones v. Gordon*, 2 App. Cas. 16; *Kellogg v. Curtis*, 69 Me. 212,

showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that, in addition to proving value, the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud.⁹⁴ If value and notice are disputed as facts, they must be passed upon by the jury. Hence it follows that it is not necessary for the defendant, as in case of lack or failure of consideration, to show that the plaintiff did not pay value, or that he had notice of the facts of the defense, but these facts must appear affirmatively on the plaintiff's part. It is probable that this rule does not mean that the plaintiff must prove a direct negative,⁹⁵ but that, as a part of the direct case, he must show the facts of the transaction constituting the transfer, and then, if there is nothing in the transaction itself to show bad faith, and there is no proof from other sources of want of good faith, or actual or constructive notice of the defense, the plaintiff must prevail.

31 Am. Rep. 273; *National Bank of North America v. Kirby*, 108 Mass. 497; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192 (N. I. L.), semble; *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99 (N. I. L.), semble. See *Benj. Chalm. Bills & N. art.* 97, and note. In *National Bank of Barre v. Foley*, 54 Misc. Rep. 126, 103 N. Y. Supp. 553 (N. I. L.), it was held that uncontradicted testimony that full value was paid was not sufficient to require a directed verdict for the plaintiff, where there was no evidence introduced to directly show bad faith. Of course, evidence of the payment of the full value of the instrument for the transfer is strong evidence of good faith. *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102 (N. I. L.).

⁹⁴ *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836. See, also, *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; *Farmers' & Citizens' Nat. Bank v. Noxon*, 45 N. Y. 762; *Cummings v. Thompson*, 18 Minn. 246 (Gll. 228); *Sullivan v. Langley*, 120 Mass. 437; *Smith v. Livingston*, 111 Mass. 842. Such has been held to be the rule under N. I. L. § 59, and also under the English Bills of Exchange Act (section 29) as construed in *Tatam v. Haslar*, 23 Q. B. Div. 345. See *National Bank of Barre v. Foley*, 54 Misc. Rep. 126, 103 N. Y. Supp. 553 (N. I. L.), stated in note 93, *supra*.

⁹⁵ *Sullivan v. Langley*, 120 Mass. 437; *National Bank of North America v. Kirby*, 108 Mass. 497. See, however, cases cited in note 89, *supra*.

CHAPTER IX

PRESENTMENT, DISHONOR, PROTEST, AND NOTICE OF DISHONOR

- 132. In General.
- 133-144. Presentment.
- 145. Protest.
- 146-147. Notice of Dishonor.
- 148. When Presentment, Protest, or Notice of Dishonor is Excused.
- 148a-148b. When Due Diligence to Effect Presentment, Protest, and Notice of Dishonor is Dispensed with.

IN GENERAL

- 132. To charge the drawer and indorsers, presentment for acceptance or for payment, as the case may be, to be followed in case of refusal by notice of dishonor, is ordinarily necessary.**

The implied promise made by the drawer¹ or indorser of a negotiable bill of exchange² is usually a conditional promise. The conditions are that reasonable diligence be used by the holder in attempting to secure acceptance or payment from the drawee, maker, or acceptor, and that in case of non-acceptance or non-payment after the exercise of such diligence, reasonable diligence be used to notify the drawer (or indorser) of that fact and that he is looked to for payment.³

¹ For a consideration of the distinction between the implied warranty by a transferrer of a negotiable instrument and the implied promise made by the drawer to the payee (and thus by the indorser to the indorsee, since the indorsement is the drawing of a new bill), see p. 211 et seq., *supra*. See *Ashley v. Himmelfart*, 66 Or. 38, 133 Pac. 771.

² As to the distinction between the liability of the drawer of a check and that of the drawer of any other bill of exchange, see p. 577, *infra*. As to what constitutes the drawing or indorsing of a negotiable bill or note, see Chapters III and IV, *supra*. See, also, *Hawkins v. Wiest*, 167 Mo. App. 439, 151 S. W. 789; *Hibernia Bank & Trust Co. v. Dresser*, 132 La. 532, 61 South. 561 (N. I. L.).

³ The law merchant also requires under certain circumstances reasonable diligence to obtain a particular kind of proof of the fact of

The practice of merchants, which, as embodied in the law merchant, fixes the implied terms of the drawer's contract, has established certain standards of due diligence in attempting to secure such acceptance or payment and in attempting to give such notice. (1) It designates those acts which under certain circumstances shall constitute reasonable (that is sufficient) diligence in attempting to secure acceptance or payment without any consideration of the other circumstances of the case. This standard is fixed for the sake of certainty. If the holder complied with it, he need not fear that all the circumstances of the case will be considered together, and the reasonableness of his conduct under all these circumstances be inquired into as an original question. This standard is known as "presentment."⁴ (2) It provides that if, under all the circumstances, reasonable diligence has been used to comply with this standard (that is, to make presentment), such reasonable diligence shall be the equivalent of presentment. In such a case it

dishonor. The certificate which is recognized as such proof is known as the "protest." See N. I. L. § 159; *infra*, § 145. Where the instrument is payable in installments, the liability of the drawee or indorser is the same as if he had drawn or indorsed several instruments, corresponding, as to time for and amount of payment, with the installments. *Hopkins v. Merrill*, 79 Conn. 628, 66 Atl. 174 (N. I. L.). It does not seem accurate to say that notice of any dishonor by non-acceptance is, unless excused or dispensed with, a condition precedent to absolute liability of the drawer or indorser. The condition as to notice of dishonor by non-acceptance seems to be a condition subsequent, and, it seems, ordinarily is that, if a holder fails to give notice of such dishonor, the drawer or indorser shall not be liable except to subsequent holders for value and without notice of such dishonor. *Dunn v. O'Keefe*, 5 Maule & Selwyn, 282. Professor Ames, however, concludes that, while due notice of some dishonor, either by non-acceptance or non-payment, is a condition precedent to the liability of the drawer or indorser, it is not such a condition precedent that the drawer or indorser be given notice of any dishonor by non-acceptance, and that a failure to give due notice of dishonor by non-acceptance has no effect on the liability of the indorser. 2 Ames' Cases Bills & Notes, 866. A similar question suggests itself as to the necessity of due notice to the drawer or indorser of any dishonor, by non-payment, of a demand instrument.

⁴ See *infra*, §§ 133-144.

is usually said that presentment is "excused."⁵ If after compliance with either (1) or (2) the instrument is unaccepted or unpaid, it is "dishonored"⁶ by non-acceptance or non-payment. (3) It designates those acts which, under certain circumstances, shall constitute reasonable (that is, sufficient) diligence in notifying the drawer or indorser of the facts constituting dishonor and that he is looked to for payment, without a consideration of the other circumstances of the case. This standard is known as "notice of dishonor,"⁷ although it does not necessarily include actual communication to the drawer or indorser. (4) It provides that if, under all the circumstances of the case, reasonable diligence has been used to comply with this standard (that is, to "give notice of dishonor"), such diligence is equivalent to "notice of dishonor." In such a case it is usually said that notice of dishonor is "excused."⁸ The drawer or indorser may, however, voluntarily excuse or "waive"⁹ compliance with any or all of these conditions, since compliance with them is merely a condition precedent to recourse against him according to the terms of his implied promise. The obligation of the drawer or indorser sometimes is or becomes unconditional, according to the law merchant, because of circumstances other than compliance with these conditions or a waiver of such compliance. When this is true, it is usually said that such compliance is "dispensed with."¹⁰

⁵ See infra, § 148.

⁸ See infra, § 148.

⁶ See infra, § 146.

⁹ See infra, § 148b.

⁷ See infra, §§ 146, 147.

¹⁰ See infra, §§ 148a, 148b. Where the obligation of the drawer or indorser is, as is usual, conditional, and the holder fails to comply with a condition, failure to comply with which has not been waived, no right of action on the instrument exists against such drawer or indorser. In such a case, although the obligation of the drawer or indorser were given only in conditional payment, no action could be maintained upon the original debt against the drawer or indorser, since he is not in default upon the obligation which he gave in conditional payment. This is all that is meant by the statement that the holder of an instrument, by his negligence in presenting it or in giving notice of dishonor, "makes the instrument his own." See, as to conditional payment, p. 25, supra.

Conflict of Laws

Where a bill or note is drawn or indorsed in one place, and is payable by the acceptor or maker in another, the formalities in respect to diligence are in general governed by the law of the place of payment of the maker's or acceptor's obligation. So far as presentment¹¹ and protest¹² are concerned, there is no conflict of authority.¹³ In England¹⁴ the same rule applies to the time and manner of giving notice of dishonor, and upon principle and upon the ground of convenience it seems that notice should stand upon the same footing as other essentials of diligence. In the United States the authorities are divided. In the leading case of *Aymar v. Sheldon*¹⁵ it was held that the time and manner of notice must conform to the law of the place

¹¹ *Rothschild v. Currie*, 1 Q. B. 43; *Todd v. Neal's Adm'r*, 49 Ala. 266; *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; *Ellis' Adm'r v. Commercial Bank of Natchez*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Snow v. Perkins*, 2 Mich. 238; *McClane v. Fitch*, 4 B. Mon. (Ky.) 600; *Cockburn v. Kinsley* (Colo. App.) 135 Pac. 112.

¹² *Townsley v. Sumrall*, 2 Pet. 170, 7 L. Ed. 386; *Ellis' Adm'r v. Commercial Bank of Natchez*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Chatham Bank v. Allison*, 15 Iowa, 357; *Carter v. Union Bank*, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89; *Simpson v. White*, 40 N. H. 540.

¹³ This is true as to the time and manner of presentment. It seems that the same law should govern as to the necessity of presentment, protest, or notice of dishonor. But the weight of authority is that the contract of the drawer or indorser is, in the absence of express stipulation, performable in the jurisdiction where made (although the maker's or acceptor's obligation may be performable in some other jurisdiction), and that the law of such place of making and performance governs as to the necessity of presentment, protest, and notice of dishonor. *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450 (N. I. L.); *Casper v. Kuehne*, 79 Misc. Rep. 411, 140 N. Y. Supp. 86 (N. I. L.). See Minor, *Conflict of Laws*, 165.

¹⁴ *Rothschild v. Currie*, 1 Q. B. 43; *Hirschfeld v. Smith*, L. R. 1 C. P. 340; *Horne v. Rouquette*, 3 Q. B. Div. 514; *Rouquette v. Overmann*, L. R. 10 Q. B. 525. The English Bills of Exchange Act, § 72, subd. 3, so provides.

¹⁵ 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; *Lee v. Selleck*, 33 N. Y. 615; *Snow v. Perkins*, 2 Mich. 238; Story, *Bills*, § 285; Story, *Notes*, § 177.

where the contract of the drawer or indorser is made and to be performed. There are, however, American authorities which maintain the English view.¹⁶

PRESENTMENT

133. The presentment of a bill or note is commonly as follows:
 - (a) Of a bill for acceptance.
 - (b) Of a bill or note for payment.
134. Presentment for acceptance may be made at any time before maturity, except in cases of bills payable at or after sight, or after demand.
135. Presentment for acceptance is necessary in the case of bills payable at or after sight, or after demand. In other cases, in the absence of express stipulation, it is optional.
136. An exhibition of the instrument is not essential to presentment, if such exhibition is not expressly or impliedly requested by the maker, drawee, or acceptor. But if a personal demand for payment is essential, the instrument must, at the time of the demand, be in the possession of the person making the demand.
137. Presentment must in general be made by the holder, or his authorized agent.
138. Presentment for acceptance may, it seems, be made by any person in possession of the instrument. Presentment for payment may be made by the holder or his agent for that purpose.
139. Presentment for acceptance must be made to the drawee or his agent authorized to accept or refuse acceptance. Presentment for payment need not always be personal.

¹⁶ *Todd v. Neal's Adm'r*, 49 Ala. 266; *Wooley v. Lyon*, 117 Ill 244, 6 N. E. 885, 57 Am. Rep. 867; *Daniel, Neg. Inst.* §§ 911, 912; *Gleason v. Thayer*, 87 Conn. 248, 87 Atl. 790 (N. I. L.).

140. Presentment for acceptance, it seems, may be made anywhere, although the bill be addressed to the drawee at a particular place. Presentment for payment may, it seems, be made anywhere, provided that refusal to pay is not placed on the ground that the presentment is at an improper place and that the presentment is to the maker, drawee, or acceptor, or his agent to make or refuse payment. Otherwise, the place of presentment is material. If the instrument is payable generally, and no other place for presentment has been specified, presentment for payment may be made at the place of business, or (on authority, but not on principle) at the place of residence of the maker, drawee, or acceptor. Where the instrument is payable at a particular place, presentment for payment may be made there.
141. If presentment for acceptance is necessary, it must be made within a reasonable time after the drawing or indorsing. What is a reasonable time may, however, be extended by putting the instrument into circulation.
142. Presentment for payment of an instrument payable on demand must be within a reasonable time after the making of the drawer's or indorser's contract.
143. Presentment for payment of an instrument payable on a given date, or at a certain time after date, demand, or sight, must be made on the day when, by its terms, the instrument is due.
144. If the hour of presentment is material, presentment must be made at a reasonable hour.

Acts Essential to Presentment

A proper legal presentment consists of an actual exhibition of the paper¹⁷ to the drawee, acceptor, or maker. In

¹⁷ Daniel, Neg. Inst. §§ 462, 463; Edw. Bills & N. § 558. As indicated in the text, "presentment" may be defined as the actual exhibition of the instrument. Bigelow, Bills, Notes & Cheques (2d Ed.)

case of a presentment for payment, the reasons for an exhibition of the bill¹⁸ are that the acceptor or maker may judge of the genuineness of the bill; that he may judge of the right of the holder to receive the contents; and that he may obtain immediate possession of the bill or note, upon paying its amount. In case of presentment for acceptance, the reasons for an exhibition of the instrument are that the acceptor has a right to see that the person demanding it has a right to do so before he is bound to answer whether he will accept or not,¹⁹ and that in those jurisdictions where it is required that the acceptance should be written on the paper, a demand for acceptance would clearly be futile unless the paper were at hand to write the acceptance upon it. But as these reasons show, this rule is for the protection of the drawee, acceptor, or maker, and he may therefore waive them by not insisting upon a personal presentment.²⁰ If the holder is in a situation to com-

105. But if thus defined, it is erroneous to say that presentment, unless dispensed with, is a condition precedent to recourse against the drawer or indorser. See note 20, infra. It is submitted that the word "presentment" has acquired the broader meaning stated upon page 469, supra. It is convenient to use the word in this latter sense, in order to avoid the frequent repetition of the larger number of words otherwise necessary to express the same idea. It is used in this broader sense in the Negotiable Instruments Law. N. I. L. § 70 et seq.

¹⁸ Musson v. Lake, 4 How. 262, 11 L. Ed. 967.

¹⁹ Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216. See Daniel, Neg. Inst. (5th Ed.) §§ 461-463. But see infra, p. 484.

²⁰ Porter v. Thom, 167 N. Y. 584, 60 N. E. 1119; Brannan, Anno. N. I. L. (2d Ed.) 93, citing Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802 (reversed 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. [N. S.] 417, Ann. Cas. 1912A, 861). But this statement of the rule is misleading. Presentment is not essential to a right of action against the maker or acceptor. See supra, p. 194. Presentment is, however, ordinarily necessary to a right of recourse against the drawer or indorser. The maker or acceptor cannot waive the performance of a condition of another's promise. The conclusion reached by the cases is that if the drawee, acceptor, or maker, upon demand for acceptance or payment being made of him personally, expressly or impliedly requests an exhibition of the instrument to him before accepting or paying, a presentment must, in almost all cases, include such an exhibition. See cases cited in note 22, infra. N. I. L. §§ 70, 74, seem literally to require an actual exhibition of the instrument.

ply with their demand for personal presentment it is sufficient. Thus, if the holder has the bill or note with him at the time of presentment, and so describes it as to leave no doubt but that the drawee, acceptor, or maker understands what the instrument in question is, and the drawee, acceptor, or maker does not require him to produce it, the presentment is sufficient, provided, of course, that these acts were done at the proper time and place.²¹ The sole requirement is that the instrument must be in the possession of the person presenting it whether exhibited or not.²² The

But the act has, in this respect, been construed to be declaratory. Central Nat. Bank of Middletown v. Stoddard, 83 Conn. 332, 76 Atl. 472 (N. I. L.). See Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802 (N. I. L.), reversed 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861.

²¹ Etheridge v. Ladd, 44 Barb. (N. Y.) 69; Ocean Nat. Bank of City of New York v. Fant, 50 N. Y. 475; Crandall v. Schroepel, 1 Hun (N. Y.) 557; Freeman v. Boynton, 7 Mass. 483; Draper v. Clemens, 4 Mo. 52; Nailor v. Bowie, 3 Md. 251; King v. Crowell, 61 Me. 244, 14 Am. Rep. 560; Fisher v. Beckwith, 19 Vt 31, 46 Am. Dec. 174; Fullerton v. Bank of United States, 1 Pet. 604, 7 L. Ed. 280.

²² The demand must be made under such circumstances that, if the maker, drawee, or acceptor chooses then to pay the instrument, it can forthwith be delivered to him. There appears to be reason for this requirement where a personal demand is essential to presentment. From the point of view of the drawer or indorser, the presence of the instrument may give greater formality and effectiveness to the demand for payment. Thus, where a note was payable at the maker's street address, and the cashier of the holder bank, which was located in the same city, but two miles away from such address, on the day of maturity, having the instrument in his possession, called up the maker at his residence by telephone and demanded payment of the instrument, which he described, informing the maker that it was at the bank, and the maker then unqualifiedly refused payment, it was held that there was not a presentment. Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861 (N. I. L.), reversing 132 App. Div. 948, 118 N. Y. Supp. 1108, which affirmed 60 Misc. Rep. 605, 112 N. Y. Supp. 802. But in Tredick v. Wendell, 1 N. H. 81, it was held that, where a note was sent for collection to a bank which was within a few rods from the maker's house, a written notice to the maker by the bank, informing him that the note was at the bank and requesting its payment, was a presentment. The court said that the conduct of the holder complied with the spirit and substance of the condition

demand²⁸ for acceptance or payment in ordinary cases should be verbal, but in some cases this may be impracticable or not in reason to be required. In such cases it may

of the indorser's promise that due diligence be used to obtain payment from the maker. The court did not expressly rest its decision upon any general practice of merchants peculiar to that jurisdiction. Such a general practice would have modified the implied terms of the indorser's promise. *Burke v. McKay*, 43 U. S. (2 How.) 66, 11 L. Ed. 181, *semile*; *Grand Bank v. Blanchard*, 40 Mass. (23 Pick.) 305. See *Barnett v. Elwood Grain Co.*, 153 Mo. App. 458, 133 S. W. 856 (N. I. L.). See, also, *Jones v. Fales*, 4 Mass. 245; *Whitwell v. Johnson*, 17 Mass. 449, 9 Am. Dec. 165; *Mechanics' Bank at Baltimore v. Merchants' Bank at Boston*, 6 Metc. (Mass.) 24; *President, etc., of Warren Bank v. Parker*, 8 Gray (Mass.) 221; *President, etc., of State Bank v. Hurd*, 12 Mass. 172; *Maine Bank v. Smith*, 18 Me. 99; *Watkins v. Crouch*, 5 Leigh (Va.) 522; 2 Ames Cas. Bills & Notes, 882. Unless there were such a practice modifying the law merchant in that jurisdiction, the decision in *Tredick v. Wendell*, 1 N. H. 80, was erroneous. In *Arnold v. Dresser*, 8 Allen (Mass.) 435, which was an action against the indorser of a joint promissory note, the facts were that upon the day of maturity payment was demanded of the promisors, but the defendant did not have the note in his possession, and he did not receive payment. It was held by Bigelow, C. J., that "no valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note, or its destruction, are shown to excuse its absence." Where, however, the instrument is unlawfully detained in the possession of the maker, drawee, or acceptor, an exhibition of the instrument or its possession by the person demanding payment is unnecessary to presentment. *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66 Pac. 326. It has been said that where an instrument has been lost it is sufficient to demand payment by a proper person, accompanied by a tender of sufficient indemnity. *Freeman v. Boynton*, 7 Mass. 483, 486, *semile*. And if a copy of the lost instrument or written particulars thereof are exhibited at the time of such demand, accompanied by the offer of indemnity, there is a sufficient demand. *Edwards*, Bills (3d Ed.) §§ 672, 697. N. I. L. § 160, provides: "Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof." In *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925 (N. I. L.), the court said: "Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purposes of im-

²⁸ See note 23 on page 478.

be in writing.²⁴ But, however made, it should be absolute, requiring present actual acceptance or payment.²⁵

mediate presentment, defendant had the opportunity and owed the duty to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the indorser"—citing N. I. L. § 160. See Klotz v. Silver (Sup.) 127 N. Y. Supp. 1090 (N. I. L.). See, also, B. E. A. §§ 51 (subd. 8), 69, 70; criticism of N. I. L. by James Barr Ames, reprinted in Brannan, Anno. N. I. L. (2d Ed.) 177; Chalmers, Dig. Bills (7th Ed.) 158; Bank of Gilby v. Farnsworth, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843; R. H. Herron Co. v. Mawby, 5 Cal. App. 43, 89 Pac. 872; First Nat. Bank of Belle Plaine v. McConnell, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336, 14 Ann. Cas. 396; California Nat. Bank v. Weldon, 14 Cal. App. 765, 113 Pac. 334. In the case of Hansard v. Robinson, 7 Barn. & C. 9, which was an action by an indorsee against the acceptor of a bill of exchange, it was shown that the bill was not presented for some time after it was due and that the defendant offered another bill, but before such bill was given, the first bill was lost by the plaintiff's clerk. It was said by Lord Tenterden, C. J., in his opinion, that it was the custom of merchants that: "The holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of the amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer." As to the acceptor's remedy should the holder refuse to deliver the bill after receipt of payment, see Alexander v. Strong, 9 Mees. & W. 733; Stone v. Clough, 41 N. H. 290; Inhabitants of Otisfield v. Mayberry, 63 Me. 197. It has consistently been held in England and many states that no action at law lies against the acceptor or maker upon a bill or note which has been lost or destroyed, the plaintiff being left to his remedy in equity, which has power to secure the defendant against being called upon a second time to pay by requiring the plaintiff to furnish indemnity. Pierson v. Hutchinson, 2 Camp. 211; Hansard v. Robinson, 7 Barn. & C. 90; Ramuz v. Crowe, 1 Exch. 167; Rowley v. Ball, 3 Cow. (N. Y.) 303; Moses v. Trice, 21 Grat. (Va.) 556, 8 Am. Rep. 609. In some states, however, a recovery at law upon furnishing indemnity has been allowed. Fales

²⁴ See note 24 on page 480.

²⁵ The demand must not be for something other than what the instrument calls for. Thus in the case of Langenberger v. Kroeger, 48 Cal. 149, 17 Am. Rep. 418, it was held that, where it was not specified in the instrument in what kind of money the draft was payable, a demand for payment in gold would not charge the drawer.

The non-acceptance or non-payment of a bill of exchange is the non-compliance on the part of the drawee with the

v. Russell, 16 Pick. (Mass.) 315; Hinckley v. Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297; Bridgeford v. Masonville Mfg. Co., 34 Conn. 546, 91 Am. Dec. 744; Morgan v. Reinzel, 7 Cranch, 273, 3 L. Ed. 340. And very generally it is held that a recovery may be had if it can be shown that the instrument has been actually destroyed. Des Arts v. Leggett, 16 N. Y. 582; Blandin's Adm'r v. Wade, 20 Kan. 251. In some states recovery without indemnity has been allowed where the instrument was destroyed, or overdue, or transferable only by indorsement, and shown to be unindorsed. In some states the matter is regulated by statute. Rand. Com. Paper, § 1699. As to whether the owner of a lost note may recover against the indorser, upon giving indemnity, it was held by Hoar, J., in Tuttle v. Standish, 4 Allen (Mass.) 481, 81 Am. Dec. 712, that "all the considerations against allowing such a recovery apply more forcibly to the case where payment is demanded of an indorser, for he is entitled to possession of the note in order to have recourse against the maker. See, generally, Rand. Com. Paper, §§ 1691-1703; Daniel, Neg. Inst. §§ 1475-1485.

²⁸ A demand for payment is not, in all situations, essential to a presentment for payment. Thus, where an instrument is payable at a particular place, it is presentment to use reasonable diligence at that place to secure payment from the maker, drawee, or acceptor, or his agent authorized to make or refuse payment. If the particular place is a bank, having the instrument at maturity in the hands of the cashier or other appropriate officer, at the place of business of the bank, is, according to the law merchant, such diligence, and thus, if done with the intention of securing immediate payment from the maker, drawee, or acceptor, is presentment. Hoffman v. Hollingsworth, 10 Ind. App. 353, 37 N. E. 980; Huffaker v. National Bank of Monticello, 76 Ky. (13 Bush) 644; Carrington v. Odom, 124 Ala. 529, 27 South. 510. See Havlin v. Continental Nat. Bank, 253 Mo. 292, 161 S. W. 741, 743; Brown v. First Nat. Bank, 216 Mass. 298, 103 N. E. 780 (N. I. L.). See page 489, infra. As to what is such diligence where the instrument is payable at a particular city or town, see page 487, infra. N. I. L. §§ 72 (subds. 3, 4), 73 (subd. 1), 74, would seem to require an exhibition and demand to some person at the place of payment. But in spite of these sections it has been held, under the act, that, where notes owned by a bank were payable at its banking house, no formal demand for payment was required, but it was sufficient that the notes were on file ready for delivery when paid. Central Nat. Bank of Middletown v. Stoddard, 83 Conn. 332, 76 Atl. 472 (N. I. L.). See infra, p. 489. Compare N. I. L. § 82 (subd. 1). As above stated it is essential that the necessary acts be done with the intention of insisting upon immediate pay-

express or implied terms of the order contained in it. The order contained in a bill of exchange on the part of the drawer and indorser is (1) an order on the drawee to ac-

ment from the maker, acceptor, or drawee. In *Williams v. Planters' & Mechanics' Nat. Bank*, 91 Tex. 651, 45 S. W. 690, the only evidence of a presentment of the note, which was payable at a particular city, was the certificate of protest, which recited that the notary had demanded payment at the indorser's place of business in the city where the note was payable. It appeared from other evidence that the maker had no place of business or of residence in that city. The trial court directed a verdict for the plaintiff holder against the indorser. This was held to be error, since there was no evidence that the presence of the notary in that city was to secure payment from the maker. So, in the case of an instrument payable at a particular place on demand, the instrument may be at that place in the hands of the appropriate officer without there being a presentment of the instrument. Within the period of a reasonable time, whether or not the presence of the instrument in the hands of such officer constitutes presentment depends upon the intention of the holder. If the holder directs a notary to protest the instrument, or if he sends out notices of dishonor, he thereby shows an intention that the presence of the instrument at the bank is for the purpose of securing immediate payment from the maker. But where there is a mere request by the holder, of the maker, to pay such an instrument, not accompanied by any intention to treat the note as dishonored in case of refusal, but made merely to secure, if possible, for the convenience of the holder, the immediate payment of the note, followed by a refusal of such immediate payment, the presence of the note in the hands of a proper person at the place of payment and the non-payment of the instrument do not constitute a dishonor, even though the request for payment was made at the place of payment. *State of New York Nat. Bank v. Kennedy*, 145 App. Div. 669, 130 N. Y. Supp. 412 (N. I. L.). Accord: *National Hudson River Bank v. Kinderhook & H. Ry. Co.*, 17 App. Div. 232, 45 N. Y. Supp. 588, affirmed 162 N. Y. 623, 57 N. E. 1118. Where the instrument is payable generally, a demand is not always essential to presentment. See p. 487, *infra*. There is, it seems, still another class of cases where a demand is not essential to presentment. In *Gilbert v. Dennis*, 3 Metc. (Mass.) 495, 38 Am. Dec. 329, it appeared that the maker, on the day of maturity, went to the holder's store, where the note was, stated to the holder that he was unable to pay the note, and requested the holder to notify the indorser. The holder did as requested. It was held that there was a presentment. *Shaw, C. J.*, said: "The declaration of the promisor that he could not pay implies that he considered the holder as looking to him for payment, which is all that was necessary, and that he anticipated a more formal offer of the note

cept the bill on presentment; (2) an order on the drawee or acceptor to pay the bill at maturity. The refusal of the drawee or acceptor, after presentment or its equivalent, to do either of these things, dishonors the bill.²⁶ The contract which the drawer and indorser make with the holder is that the drawee will, in the first place accept the bill. It differs in cases of bills payable after sight or after demand and bills payable on a given date, because in the former cases from the terms of the contract the time for which the drawer or indorser indemnifies the holder is uncertain and

and demand for payment, by a declaration which rendered it unnecessary."

²⁴ Where a demand is essential, it is not always necessary that it be made on behalf of the holder by a person physically in the presence of the maker, drawee, or acceptor. Thus, in the absence of a showing of damage resulting from such a course, it is sufficient as against an indorser, to send a check by mail directly to the drawee bank, located in a different city or town, accompanied by a written demand for payment. *Plover Sav. Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476 (N. I. L.); *Citizens' Bank of Pleasantville v. First Nat. Bank of Pleasantville*, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303 (N. I. L.). See, also, *Carson, Pirle, Scott & Co. v. Fincher*, 129 Mich. 687, 89 N. W. 570. 95 Am. St. Rep. 449; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 69 N. W. 765, 61 Am. St. Rep. 550; *Pelt v. Marlar*, 95 Ark. 111, 128 S. W. 554; *Hough v. Gearen*, 110 Iowa, 240, 81 N. W. 463. But see *R. H. Herron Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. 872. Such a presentment would not, however, be sufficient, it seems, where the holder and the maker, drawee or acceptor reside or do business in the same city. See *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861 (N. I. L.); *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (N. I. L.). And where demand is thus made without physical presence, it is still essential that the instrument be sent to the person from whom payment is demanded, so that he may, upon payment, have immediate possession of it. *Gilpin v. Savage*, supra. See statement of this case in note 22, supra. Contra: *Tredick v. Wendell*, 1 N. H. 81. See *Barnett v. Elwood Grain Co.*, 153 Mo. App. 458, 133 S. W. 856 (N. I. L.). For this additional reason it is not a presentment to send a written notice and demand, together with a copy of the check, to the drawee. *Harrington v. First Nat. Bank of Marseilles*, 85 Ill. App. 212, 219. A fortiori it is not presentment to mail a letter demanding payment of a note. *Closz v. Miracle*, 103 Iowa, 198, 72 N. W. 502.

²⁶ Ames Bills & N. p. 787; Edw. Neg. Inst. §§ 529-535.

indefinite. To prevent this from becoming a hardship to these parties, the law declares that in cases of bills made payable after sight, or after demand, the contract of the drawer or indorser is that the drawee, on the bill being presented to him in a reasonable time from the date of drawing or indorsing, shall accept it, and, having so accepted, shall pay it when duly presented for payment.²⁷ Presentment for acceptance in such cases is hence essential.²⁸ But in case of a bill payable a certain time after date, the contract of the drawer and indorser is that the drawee shall accept it if it is presented to him before the time of payment; and, having so accepted, shall pay it when it is in due course presented for payment. The contract of the drawer and indorser is distinguished from their contract on bills payable after demand, or after sight, in that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, and the indorser makes a new bill on the same terms, and waives his right of immediate acceptance by putting his bill into circulation without acceptance. Presentment for acceptance in this case is therefore optional,²⁹ for, if the bill is not pre-

²⁷ *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Aymar v. Beers*, 7 Cow. 705, 17 Am. Dec. 538; *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259; *Eltong v. Brinkerhoff*, 2 Hall (N. Y.) 459; *Muliman v. D'Eguino*, 2 H. Bl. 569; *Wallace v. Agry*, 4 Mason, 336, Fed. Cas. No. 17,096; *Id.*, 5 Mason, 118, Fed. Cas. No. 17,098; *Mitchell v. De Grand*, 1 Mason, 176, Fed. Cas. No. 9,661; *Nichols v. Blackmore*, 27 Tex. 586; *Mullick v. Rada-kissen*, 9 Moore, P. C. 46.

²⁸ N. I. L. § 143. That section provides: "Presentment for acceptance must be made: 1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or, 2. Where the bill expressly stipulates that it shall be presented for acceptance; or, 3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary, in order to remedy any party to the bill liable."

²⁹ *Philpott v. Bryant*, 3 Car. & P. 244; *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. Ed. 37; *House v. Adams*, 48 Pa. 261, 86 Am. Dec. 588; *Walker v. Stetson*, 19 Ohio St. 400, 2 Am. Rep. 405; *Bank of Benning v. Raymond*, 12 Vt. 401; *Bachellor v. Priest*, 12 Pick. (Mass.) 399; *Orr v. Maginnis*, 7 East, 362; *Goodall v. Dolly*,

sented for acceptance at all, nevertheless the drawer and indorser make a contract that the drawee shall pay it when duly presented for payment.

Presentment for acceptance, except in the case of sight bills, is thus only for the security of the holder. He has the option of seeking from the drawer and indorser a remedy for non-acceptance or a remedy for non-payment. If by protest and notice of non-acceptance he has put himself in a condition to sue the drawer and indorser, he may, as a matter of prudence, retain the bill, and endeavor to obtain payment from the drawee when the bill has arrived at maturity, and not involve himself in a litigation until there has been a failure of payment as well as of acceptance.⁸⁰ But by non-acceptance, followed by protest and no-

¹ Term R. 713. "In relation to a bill payable at a day certain, as at a fixed time after its date, it is perfectly well settled not only in this country and in England, but also in Scotland, and in France, that the drawer or indorser of the bill is not discharged by the neglect of the holder to present the same for acceptance immediately, or until the time when it becomes due and payable." Opinion in *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 323, 32 Am. Dec. 555. "Where presentment is optional, the object of presenting is: (1) To obtain the acceptance of the drawee, and thereby secure his liability as a party to the bill; (2) to obtain an immediate right of recourse against antecedent parties in case the bill is dishonored by non-acceptance." *Chalm. Bills Exch.* (4th Ed.) 132. In *Plato v. Reynolds*, 27 N. Y. 586, where a bill payable one day after date was presented for acceptance on the day it matured, refusal to accept was held equivalent to refusal to pay, and to render a demand for payment unnecessary. *Wright, J.*, said: "It is well settled that the holder of a bill payable a specified time after date, or on a certain day, need not, for the purpose of charging the drawers and indorsers, present it for acceptance until it becomes due and payable. It may be presented before or at the time of maturity." The Negotiable Instruments Law is declaratory. See *N. I. L.* § 143. *National Park Bank of New York v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927 (*N. I. L.*); *Berenson v. London & Lancashire Fire Ins. Co. of Liverpool, Eng.*, 201 Mass. 172, 87 N. E. 687 (*N. I. L.*); *First Nat. Bank v. Whitemore*, 177 Fed. 397, 101 C. C. A. 401 (*N. I. L.*).

⁸⁰ *Whitehead v. Walker*, 9 Mees. & W. 506. In this case it was held that the holder of a bill of exchange, on non-acceptance and protest, and notice thereof, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the

tice of dishonor, an immediate right of action accrues to the holder against both the drawer and indorser.³¹ And in all these cases the contracts of the drawer and indorsers stand upon a similar footing.³²

The reason why bills payable on demand and at sight differ in the necessity for their presentment for acceptance is from the difference of meaning of the terms embodied in the contract. The term "demand" is construed to mean forthwith upon presentment. The common-law theory was that even demand was unnecessary, because it evidenced a debt in *præsenti* where the debt itself was precedent to any demand.³³ Hence, demand notes and instruments of that character were not, in general, entitled to grace.³⁴ But "at sight" means the same thing as "upon acceptance."³⁵

non-payment of the bill when due. The statute of limitations, therefore, runs against him from the former, and not from the latter, period. Compare note 3, *supra*.

³¹ *Mason v. Franklin*, 3 Johns. (N. Y.) 202; *Weldon v. Buck*, 4 Johns. (N. Y.) 144; *Watson v. Loring*, 3 Mass. 557; *Union Bank v. Hyde*, 6 Wheat. 572, 5 L. Ed. 333; *Sterry v. Robinson*, 1 Day (Conn.) 11; *Thompson v. Cumming*, 2 Leigh (Va.) 321; *Smith v. Roach's Ex'r*, 7 B. Mon. (Ky.) 17; *Bright v. Purrier*, 3 Burrows, 1687; *Milford v. Mayer*, 1 Doug. 55; *Evans v. Gee*, 11 Pet. 80, 9 L. Ed. 639; *Lucas v. Ladew*, 28 Mo. 342; *Exeter Bank v. Gordon*, 8 N. H. 66; *Winthrop v. Pepoon*, 1 Bay (S. C.) 468; N. I. L. § 151.

³² *Ballingalls v. Gloster*, 3 East, 481. It was held in this case by Lord Ellenborough, C. J., that "there is no distinguishing the case of an indorser from that of the drawer, it having been long ago decided that every indorser is in the nature of a new drawer, every indorsement as a new bill, and that the indorser stands, as to his indorsee, in the law merchant, the same as the drawer." See, also, the case of *Heylyn v. Adamson*, 2 Burrows, 669, where it is said by Lord Mansfield that when a bill of exchange is indorsed, "as between the indorser and indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer." See, also, the opinion in the case of *Suse v. Pomp*. 30 Law J. C. P. 75.

³³ *Capp v. Lancaster*, Cro. Eliz. 548; *Rumball v. Ball*, 10 Mod. 38; *Collins v. Denning*, 3 Salk. 227; 15 Vin. Abr. 109.

³⁴ 1 Pars. Notes & B. 407; *Story, Prom. Notes*, § 224; *Story, Bills*, § 342; *Harrison v. Cammer*, 2 McCord, 246; *First Nat. Bank of Davenport v. Price*, 52 Iowa, 570, 3 N. W. 639; *Luckey v. Pepper, Morris (Iowa) 490.*

³⁵ This rule is changed by the Negotiable Instruments Law. Section 7, N. I. L., provides: "An instrument is payable on de-

And, as a general thing, a bill or note payable at sight or after sight does not become due until it is seen or accepted.⁸⁶ Hence, bills payable at sight are held to be entitled to grace,⁸⁷ because they do not become due until an opportunity for their acceptance is given, and, if accepted, the acceptor is entitled to the usual extension of time to pay them. As a consequence of the construction of these terms, bills payable on demand need not be presented at all for acceptance, but need only be presented for payment.⁸⁸

By Whom Presentment Should be Made

Presentment for acceptance, it seems, may be made by any person in possession of the instrument, even where it is specially indorsed.⁸⁹ A presentment for payment made by

mand: 1. Where it is expressed to be payable on demand or at sight or on presentation. * * *

⁸⁶ Campbell v. French, 6 Term R. 200, 2 H. Bl. 163; Sutton v. Toomer, 7 Barn. & C. 416; Holmes v. Kerrison, 2 Taunt. 323; Sturdy v. Henderson, 4 Barn. & Ald. 592. In Thorpe v. Booth, Ryan & M. 388, it was held that the statute of limitations did not run against a note payable 24 months after demand until demand had been made. A promissory note was made in the following form: "I promise to pay M. A. D., or bearer, on demand, the sum of £16 at sight." Held, that no action was maintainable without a presentment for sight. Dixon v. Nuttall, 1 Cromp., M. & R. 306. As holding that the statute of limitations runs from the date of a note payable on demand, and not from the time of demand, see Norton v. Ellam, 6 Law J. Exch. 121.

⁸⁷ HART v. SMITH, 15 Ala. 807, 50 Am. Dec. 161, Moore Cases Bills and Notes, 227; Thornburg v. Emmons, 23 W. Va. 325; Janson v. Thomas, 3 Doug. 421; Daniel, Neg. Inst. § 617.

⁸⁸ Daniel, Neg. Inst. § 454. See N. I. L. § 143.

⁸⁹ In Chitty & Hulme, Bills (13th Am. Ed.) *274, it is said: "The presentment for acceptance should in general be made by the rightful holder. But it is stated that, if a wrongful holder should present for acceptance, the drawee should nevertheless accept the bill, and may do so without risk, and if he refuse it is said that a valid protest for non-acceptance may be made, and which will inure to the benefit of the party entitled to the bill." No cases involving this point seem to have arisen. See Bachelor v. Priest, 12 Pick. (Mass.) 399. Compare N. I. L. §§ 144, 145, 148 (subd. 3). It is clear that, if there is an actual acceptance, the one having legal title to the instrument may maintain an action upon such acceptance, although the presentment for acceptance was not made by one having legal title to the instrument or his agent. Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345.

the holder⁴⁰ or his agent⁴¹ is sufficient, alike where the instrument is payable to bearer,⁴² where it is indorsed in blank,⁴³ and where it is payable to order or specially indorsed. In any such case parol authority is sufficient.⁴⁴ Clearly no evidence of such authority need be shown to the maker, drawee, or acceptor where it is not requested.⁴⁵

⁴⁰ Where the instrument is payable to bearer, a payment to any one in possession of the instrument, at least where such payment is made in ignorance that such possession is wrongful as to some prior possessor of the instrument, is a defense in an action on the instrument by the person who had such prior possession. *Cone v. Brown*, 15 Rich. (S. C.) 262. See *supra*, 397. But if a presentment by such person wrongfully in possession is a sufficient presentment: (1) Where the maker or drawee knows or suspects the wrongfulness of the possession; (2) where the maker does not know or suspect the wrongfulness of such possession? No case seems to have arisen in which this question was raised. Compare N. I. L. §§ 16, 72 (subd. 1), 191. See *Bigelow, Bills, Notes & Cheques* (2d Ed.) 124. See, also, as to who is a holder, *supra*, p. 398 et seq.

⁴¹ It has been suggested that sending a check by mail directly to the drawee bank, together with a written demand for payment, is not a presentment, because the drawee cannot be an agent to make presentment to himself. *R. H. Herron Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. 872, semble. But the sound view, supported by the weight of authority, is that the presentment in such case is made by the one who sends the instrument to the maker or drawee. See cases cited in note 24, p. 480, *supra*. See, also, *Bigelow, Bills, Notes & Cheques* (2d Ed.) 124. Compare *Knickerbocker Trust Co. v. Miller*, 156 App. Div. 810, 142 N. Y. Supp. 440 (N. I. L.).

⁴² Any one who is in possession of a bearer instrument, having acquired or retained such possession with the consent of a prior lawful possessor, is a holder of the instrument, although he may have been instructed not to present it. *Cone v. Brown*, 15 Rich. (S. C.) 262. A presentment by such a holder is sufficient, although he may be bound in equity to pay over the entire payment, if received, to some cestui que trust. See *Chitty & Hulme, Bills* (13th Am. Ed.) *365.

⁴³ An instrument last indorsed in blank is treated, with respect to presentment, as a bearer instrument. *Ewen v. Wilbor*, 99 Ill. App. 132, affirmed 208 Ill. 492, 70 N. E. 575. See p. 154, *supra*. See, also, N. I. L. § 9 (subd. 5).

⁴⁴ *Freeman v. Boynton*, 7 Mass. 483, 487; *Agnew v. Bank of Gettysburg*, 2 Har. & G. (Md.) 478; President, etc., of Hartford Bank v. Barry, 17 Mass. 94.

⁴⁵ *Freeman v. Boynton*, *supra*; *Agnew v. Bank of Gettysburg*, *supra*; President, etc., of Hartford Bank v. Barry, *supra*.

Even where it is requested for the protection of the maker, drawee, or acceptor, it seems that no showing of authority other than the possession of the instrument is essential to presentment.⁴⁶ Where the instrument is payable to order or specially indorsed, the presentment must be by the payee or indorsee, or his duly authorized agent.⁴⁷ The agent for presentment is usually a notary public. Where a protest is essential to prove dishonor, it is generally said that the presentment must be made by a notary.⁴⁸ Where a protest is not essential, it is clear that presentment need not be by a notary.⁴⁹

To Whom Presentment Should be Made

A presentment for acceptance must be made to the drawee in person or to his agent authorized to accept or to refuse acceptance.⁵⁰ If the drawee is dead, the better opin-

⁴⁶ See *Freeman v. Boynton*, *supra*; *Agnew v. Bank of Gettysburg*, *supra*; *President, etc., of Hartford Bank v. Barry*, *supra*. But see *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230, 240.

⁴⁷ *Hofrichter v. Enyeart*, 71 Neb. 771, 90 N. W. 658. See N. I. L. §§ 72 (subd. 1), 191. A subsequent ratification cannot make a presentment, unauthorized by the holder, sufficient. See *Hofrichter v. Enyeart*, *supra*. It seems that a presentment by an indorser in possession of an instrument which he previously indorsed specially is sufficient, although there has been no reindorsement, and although he has not stricken out the indorsements to subsequent parties. *Dugan v. U. S.*, 3 Wheat. 172, 4 L. Ed. 362. This conclusion is consistent with the statement in the text, for, although such indorser is not a holder, he has become, by the redelivery of the instrument to him, the assignee or agent for collection of the holder. See *Bigelow, Bills, Notes & Cheques* (2d Ed.) 124. This same result follows where the presentment is made by one to whom an instrument payable to order or specially indorsed has been delivered for value, but the indorsement has been omitted by mistake, or there is a contract to indorse to him. See *Franklin Bank v. Raymond*, 3 Wend. (N. Y.) 69.

⁴⁸ But see note 53, p. 524, *infra*.

⁴⁹ *MERCHANTS' BANK v. SPICER*, 6 Wend. (N. Y.) 443; *Baer v. Leppert*, 12 Hun (N. Y.) 516; *President, etc., of Hartford Bank v. Barry*, 17 Mass. 94; *Shed v. Brett*, 1 Pick. (Mass.) 401, 413, 11 Am. Dec. 209; *Seaver v. Lincoln*, 21 Pick. (Mass.) 287; *Hartford Bank v. Stedman*, 3 Conn. 489.

⁵⁰ Presentment for acceptance must be personal. *Cheek v. Roper*, 5 Esp. 175. In this case it was held that, in order to charge the drawer of an unaccepted bill, some actual evidence of a demand to

ion is that there is no person to whom such presentment can be made, and it is therefore excused.⁵¹ Presentment for payment, however, need not always be personal, and where personal it need not always be to the person primarily liable or his agent. Where the instrument is payable generally, going to the promisor's place of business during business hours to demand payment, and finding it shut and no person there, is a presentment, although no further inquiry is made.⁵² Presentment should be made to some person on the premises, if any person is there to be

accept on the drawee must be proved. It is not sufficient to call at the residence of the drawee, and for an acceptance to be refused by a person who was unknown by the one making the demand. *Sharpe v. Drew*, 9 Ind. 281. Compare note 23, p. 478, *supra*; note 52, *infra*. See, also, *Nelson v. Fetterall*, 7 Leigh (Va.) 180; *Stainback v. Bank of Virginia*, 11 Grat. (Va.) 260. It seems that a bill addressed to several persons should be presented to all unless one be authorized to accept for all. See *Daniel, Neg. Inst.* (5th Ed.) § 455; N. I. L. § 145 (subd. 1). If addressed to a partnership, acceptance by one partner would be sufficient, but not after dissolution and notice thereof. *Tombeckbee Bank v. Dumell*, 5 Mason, 56, Fed. Cas. No. 14,081. See N. I. L. § 145 (subd. 1).

⁵¹ *Tied. Com. Paper*, § 212; N. I. L. § 145 (subd. 2), provides that "presentment may be made to his personal representative." Referring to the similar enactment of the Bills of Exchange Act, Judge Chalmers says: "Before this enactment the law on this point was very doubtful. *Smith v. Bank*, 8 Moore, P. C. (N. S.) at pages 461, 462. Now the holder has an option." *Chalm. Bills Exch.* (4th Ed.) 137. See N. I. L. § 148 (subd. 1).

⁵² *Gilbert v. Field*, 18 Mass. (1 Pick.) 413, note; *Deyraud v. Banks*, 16 La. 461; *Niblack v. Park Nat. Bank*, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203, *semble*. In the case of *Barnes v. Vaughan*, 6 R. I. 259, no place was named in the note in question, and it was held that payment must be demanded from the maker in person, or at his place of business or residence, on the last day of grace. But see N. I. L. §§ 72 (subd. 4), 73, which, strictly construed, would require a personal presentment, although not necessarily to the maker or acceptor or his agent. See, however, N. I. L. § 82. It seems that where an instrument is made payable at a given city, without naming a place of payment therein, and the maker does not reside or have a place of business there, the possession of the instrument in that city, on the day of maturity, by the holder or his agent for the purpose of collection is a presentment. *Wood v. Rosendale*, 18 Ohio Cir. Ct. R. 247; *Williams v. Planters' & Mechanics' Nat. Bank*, 91 Tex. 651, 45 S. W. 690. But see N. I. L. §§ 72, 73.

found.⁵³ If the maker, drawee, or acceptor, or his agent authorized to make or refuse payment, is there accessible, presentment can, it seems, be made only to such person.⁵⁴ If the maker, drawee, or acceptor is dead, presentment must be to the personal representative, if one has been appointed.⁵⁵ If none has been appointed, presentment must be at the acceptor's, drawee's, or maker's former place of residence.⁵⁶ Where the persons primarily liable on the instrument are liable as partners, since each is the agent of the others, the presentment may be made to any one of them, even though there has been a dissolution of the firm.⁵⁷ But where several persons, not partners, are primarily liable, presentment, to be sufficient, must be to each of them, unless one of them is the agent for one or more of the others.⁵⁸

⁵³ Daniel, Neg. Inst. (5th Ed.) § 590; N. I. L. § 72 (subd. 4).

⁵⁴ See section 72 (subd. 4), N. I. L. In *Jackson v. McInnis*, 33 Or. 529, 54 Pac. 884, 55 Pac. 535, 43 L. R. A. 128, 72 Am. St. Rep. 755, the court went so far as to hold that the receiver of an insolvent banking corporation was not its agent for the purpose of making or refusing payment of a certificate of deposit of which it was maker. See *Armstrong v. Thruston*, 11 Md. 148.

⁵⁵ *Magruder v. Union Bank*, 3 Pet. 87, 7 L. Ed. 612; *Groth v. Gyger*, 81 Pa. 271, 72 Am. Dec. 745. N. I. L. § 76, is declaratory, and also provides that where, after the exercise of reasonable diligence, such representative cannot be found, presentment to him is excused. See *REED v. SPEAR*, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), *Moore Cases Bills and Notes*, 250. See *infra*, § 148.

⁵⁶ *Magruder v. Union Bank*, 3 Pet. 87, 7 L. Ed. 612; *Juniata Bank v. Hale*, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558; *Price's Ex'x v. Young*, 1 Nott & McC. (S. C.) 438; *Gower v. Moore*, 25 Me. 16, 43 Am. Dec. 247. See N. I. L. §§ 73 (subd. 4), 76, 82 (subd. 1). See, also, *Bigelow, Bills, Notes & Cheques* (2d Ed.) 126.

⁵⁷ This is the substance of N. I. L. § 77, which is declaratory. *Brown v. Turner*, 15 Ala. 832; *Cayuga County Bank v. Hunt*, 2 Hill (N. Y.) 635; *Gates v. Beecher*, 60 N. Y. 518, 19 Am. Rep. 207; *Crowley v. Barry*, 4 Gill (Md.) 194; *Fourth Nat. Bank v. Heuschen*, 52 Mo. 207. In the case of *Brown v. Turner*, 15 Ala. 832, it was held that, where a bill was accepted by two partners, demand of payment made of the agent of one of them, in the absence from the city of both partners, was sufficient to charge the drawer.

⁵⁸ This is the substance of N. I. L. § 78. Compare *Id.* § 82. *Arnold v. Dresser*, 8 Allen (Mass.) 435; *Willis v. Green*, 5 Hill (N. Y.) 232, 40 Am. Dec. 851; *Blake v. McMillen*, 33 Iowa, 150; *Benedict*

Where the instrument is payable at a particular place,⁶⁰ and presentment at that place is relied upon, the presentment must, if possible, be made to some person on the premises who may reasonably be supposed to know or to have charge of the funds of the maker, drawee, or acceptor, if there.⁶¹ Where no such person is there accessible, the having of the instrument there at a proper time is presentment.⁶²

Place of Presentment

We have seen that presentment for acceptance must be to the drawee in person or to his agent in that behalf.⁶³ The reason for this requirement is that the drawee cannot know when the instrument may be presented for acceptance.⁶⁴ It follows that personal presentment to any one else, or the mere presence of the instrument, even though at the place of business or residence of the drawee, is not a pre-

v. Schmieg, 18 Wash. 476, 43 Pac. 374, 36 L. R. A. 703, 52 Am. St. Rep. 61.

⁶⁰ The particular place here referred to is a bank or other institution. As to the manner of presentment where the instrument is payable at a particular city, see p. 487, *supra*, and p. 495, *infra*.

⁶¹ Matthews v. Haydon, 2 Esp. 509; Sanford v. Norton, 17 Vt. 285; Draper v. Clemens, 4 Mo. 52; Phillips v. Poindexter, 18 Ala. 579; Bank of England v. Newman, 12 Mod. 241. In this case it was held that a demand of a servant of the drawer, who used to pay money for him, was a good demand. Whaley v. Houston, 12 La. Ann. 585. N. I. L. § 72 (subd. 4), has been construed to require merely that presentment be made to some one connected with the place of payment. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093 (N. I. L.). It is not, however, always necessary that a personal demand for payment should be made. See *supra*, note 478. See, also, Bigelow, Bills, Notes & Cheques (2d Ed.) 106, 107.

⁶² N. I. L. § 72 (subd. 4), seems to require a presentment to some person on the premises, although no person likely to have authority to pay or refuse payment be there. But see Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.), where it was suggested that a presentment to the receiver of an insolvent bank, which was the place of payment, would be unnecessary, although he were the only person at such place, because he would have no power to receive or hold money for the purpose of meeting obligations maturing at the bank. See Auten v. Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329. See, also, N. I. L. § 82 (subd. 1).

⁶³ See p. 486, *supra*.

⁶⁴ Bank of Washington v. Triplett, 1 Pet. 25, 35, 7 L. Ed. 37.

sentment for acceptance.⁶⁴ This, it seems, is true, even though the bill, when drawn, designates a particular place as the address at which the drawee is to be sought.⁶⁵ Presentment for payment, however, need not always be personal, although it may, and in many situations must, be personal.

If the instrument is payable generally, the place of presentment for payment is material only (1) if the maker, drawee, or acceptor, or his agent to make or refuse payment, refuses to pay upon the ground that the demand is made at an inconvenient place; or (2) if the only demand is of some person other than the maker, drawee, or acceptor, or his agent to make or refuse payment, or merely taking the instrument to a certain place is relied upon as sufficient, it being shown that no proper person of whom to make demand could, with reasonable diligence, be found at that place.

(1) It is not likely that the maker, drawee, or acceptor will have funds with him wherever he may be found. Accordingly a demand on the street is not sufficient, if he refuses to pay because of the place where the demand is

⁶⁴ *Wiseman v. Chiappella*, 23 How. 368, 377, 16 L. Ed. 466, semble; *Chitty & Hulme, Bills* (13th Am. Ed.), *278, *280. In *Chalmers, Dig. Bills* (4th Ed.) 138, it is said: "Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Any one can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment." Presentment for acceptance must be distinguished from sufficient diligence in attempting such presentment. See *Chitty & Hulme, Bills* (13th Am. Ed.) *280. See *infra*, § 148 (excuses for failure to present for acceptance).

⁶⁵ *Chitty & Hulme, Bills* (13th Am. Ed.) *280. Compare *Wolfe v. Jewett*, 10 La. 383; *Anonymous*, 1 Ld. Raym. 743.

made⁶⁶ (provided that his place of business or of residence could, with reasonable diligence, be found).⁶⁷ But if the refusal to pay is made without giving this reason, such a demand is sufficient.⁶⁸ On principle, if refusal to pay is placed upon the ground that the place of demand is inconvenient, presentment at the residence of the maker, drawee, or acceptor, there being also a place of business, is insufficient,⁶⁹ especially where provision for the payment has been made at the place of business. But the view that presentment at either place is sufficient is supported by numerous dicta,⁷⁰ by some decisions,⁷¹ and, it seems, by the Negotiable Instruments Law.⁷² Presentment at the place of business of the maker, drawee, or acceptor, where he ordinarily pays his obligations, is sufficient, although he object to presentment at that place.⁷³ (2) In either of these situations, on principle, a presentment merely at the residence of the maker, drawee, or acceptor is insufficient, even more clearly than in (1). But the opposite conclusion has the support of numerous dicta,⁷⁴ some decisions,⁷⁵ and it seems, of the Negotiable Instruments Law,⁷⁶ although not of the English Bills of Exchange Act.⁷⁷ Presentment at the place of business is, however, sufficient.⁷⁸ Where an established place

⁶⁶ King v. Crowell, 61 Me. 244, 14 Am. Rep. 560, semble. See N. L. L. § 73 (subd. 4).

⁶⁷ See N. I. L. § 73 (subd. 4).

⁶⁸ King v. Crowell, *supra*.

⁶⁹ This seems to be the rule under the English Bills of Exchange Act, B. E. A. § 45 (4) (c).

⁷⁰ Wiseman v. Chiappella, 23 How. 368, 377, 16 L. Ed. 466. See Bigelow, Bills, Notes & Cheques (2d Ed.) 110, and cases there cited.

⁷¹ Shed v. Brett, 18 Mass. (1 Pick.) 413; Deyraud v. Banks, 16 La. 461.

⁷² N. I. L. § 73 (subd. 3).

⁷³ Tied. Com. Paper, § 213. "I have no doubt, where a person has an office or known and settled place of business for the transaction of his moneyed concerns, * * * a presentment and demand at that place (as well as a presentment and demand at his residence) is good in law." Dayton, J., in *Sussex Bank v. Baldwin*, 17 N. J. Law, 488.

⁷⁴ Note 70, *supra*.

⁷⁵ Note 71, *supra*.

⁷⁶ Note 72, *supra*.

⁷⁷ Note 69, *supra*.

⁷⁸ See note 73, *supra*.

of business or of residence can, with reasonable diligence, be discovered, presentment must be made at one place or the other.⁷⁹ When neither can thus be found, presentment at the last known place of business or residence is, it seems, sufficient.⁸⁰ And if, between the time when the primary obligation was assumed and its maturity, the primary obligor has removed from the state, presentment at the last known place of business or of residence within the state is sufficient.⁸¹ In either (1) or (2), where the address of the maker, drawee, or acceptor is given on the face of the instrument, such address is considered the most appropriate place for the presentment. A presentment at that place is therefore sufficient.⁸² So where the maker or acceptor, the

⁷⁹ Barnes v. Vaughan, 6 R. I. 259; Anderson v. Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442; W. S. Miller & Co. v. Thompson, Harp. (S. C.) 526.

⁸⁰ N. I. L. § 73 (subd. 4). See, however, Chalmers, Dig. Bills (7th Ed.) 160, note 3. See Chitty & Hulme, Bills (13th Am. Ed.) 413, note 2. See, also, Bigelow, Bills, Notes & Cheques (2d Ed.) 111.

⁸¹ By the weight of authority, in such case presentment is unnecessary. McGruder v. Bank of Washington, 9 Wheat. 598, 6 L. Ed. 170; Gillespie v. Hannahan, 4 McCord (S. C.) 503; Reid v. Morrison, 2 Watts & S. (Pa.) 401; Wheeler v. Field, 6 Metc. (Mass.) 290; Central Bank v. Allen, 16 Me. 41; President, etc., of Grafton Bank v. Cox, 13 Gray (Mass.) 503. But if the maker of a note, when it is made or indorsed, has a known residence out of the state, which remains unchanged, demand must be made on him, or due diligence used. Bank of Orleans v. Whittemore, 12 Gray (Mass.) 469, 74 Am. Dec. 605; Taylor v. Snyder, 3 Denio (N. Y.) 150, 45 Am. Dec. 457. See Leonard v. Olson, 99 Iowa, 162, 68 N. W. 677, 35 L. R. A. 381. 61 Am. St. Rep. 230, and cases cited. See, also, Dennie v. Walker, 7 N. H. 199; Erwin v. Adams, 2 La. 318; Sands v. Clarke, 8 C. L. 751. The better view, however, seems to be that in case of such removal only any effort to make presentment at the new place of business or residence in another state is unnecessary, but that an effort to obtain payment at the former place of business or residence within the state is still necessary to presentment. See Adams v. Leland, 30 N. Y. 309. See, also, Chitty & Hulme, Bills (13th Am. Ed.) 413, note 3; Bigelow, Bills, Notes & Cheques (2d Ed.) 112. Of course, if such former place of business or residence cannot, after due diligence, be found, presentment is excused. See *infra*, § 148.

⁸² Hine v. Alley, 1 N. & M. 433, where, however, the court seems to consider such a designation of address as making the instrument payable at a particular place; Buxton v. Jones, 1 M. & Gr. 83. See N. I. L. § 73 (subd. 4). See, also, Chalmers, Dig. Bills (7th Ed.) 160.

drawer or indorser, and the holder agree, by parol, upon a particular place for presentment, a presentment at that place is sufficient.⁸³

If the instrument is payable at a particular place⁸⁴

⁸³ Pearson v. Bank of Metropolis, 1 Pet. 89, 7 L. Ed. 65; Meyer v. Hibsher, 47 N. Y. 265; Sussex Bank v. Baldwin & Shipman, 17 N. J. Law, 487, *semble*. But see Story, Notes, § 49; 2 Ames Cas. Bills & Notes, 133, note. Parol evidence will not, however, be admitted to show that an instrument, on its face payable generally, was intended to be payable at a particular place. Story, Notes, § 49; Pierce v. Whitney, 29 Me. 188, 195. Compare Thompson v. Ketcham, 4 Johns. (N. Y.) 285. A fortiorari, where an instrument is, on its face, payable at a particular place, parol evidence will not be received to show that it was payable at some other particular place. Story, Notes, § 49; Anderson v. Drake, 14 Johns. (N. Y.) 114, 116, 7 Am. Dec. 442, *semble*. Compare President, etc., of State Bank v. Hurd, 12 Mass. 172. But an agreement that presentment of an instrument on its face payable generally may be presented at a particular place does not purport to change the written contract. The terms of the written contract are implied. Under certain circumstances the implied terms are, according to the practice of merchants, different than under other circumstances. An agreement designating a place for presentment other than the residence or place of business of the maker, drawee, or acceptor is a circumstance. Where this circumstance is present, the essentials of reasonable diligence to obtain acceptance or payment, that is, the essentials of presentment, are different than where no such place is so designated. In Pearson v. Bank of Metropolis, *supra*, 1 Pet. at page 92, 7 L. Ed. 65, Marshall, C. J., said: "This contract [of the indorser] is not written, but is implied. It is that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent. We think, then, that there was no error in admitting the parol evidence which was admitted, offered to sustain the action."

⁸⁴ A particular place of payment may be a city, a town, a building, or a room, described geographically, e. g., 114 South Main street, St. Louis, Mo., or it may be and almost always is the city, town, building, or room where a particular person, firm, or corporation does business, e. g., the First National Bank, of Nashville, Tenn. See Halstead v. Woods, 48 Ind. App. 127, 95 N. E. 429, 431. Some diligence, therefore, is often necessary in order to find the place of payment. Thus, in Hutchison v. Crutcher, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89, where the bank at which the note was made payable was in the hands of a receiver, who had removed the books

(whether the instrument be payable in a particular city or town,⁸⁵ in some smaller place, or at some bank or other institution), it seems that, as in the case of an instrument payable generally, a presentment anywhere to the maker, drawee or acceptor, or his agent to make or refuse payment, is sufficient, if the refusal to pay is not placed on the ground that the presentment is not made at a proper place, at least where there are no funds at the designated place of payment.⁸⁶ Where, however, the refusal is placed

and assets from the former bank building to an office in the same city, the location of which was generally known in the business community of that city, it was held that the indorser was discharged by a failure to present the instrument at that office. See, also, Iron Clad Mfg. Co. v. Sackin, 129 App. Div. 555, 114 N. Y. Supp. 42 (N. I. L.). The particular place of payment may be specified either by the drawer or the acceptor, provided that the acceptance does not change the tenor of the bill. Chalm. Dig. art. 166; Gibb v. Mather, 8 Bing. 214; Foden v. Sharp, 4 Johns. (N. Y.) 183; Troy City Bank v. Lauman, 19 N. Y. 477; Blair v. Bank of Tennessee, 11 Humph. (Tenn.) 84. See Edwards, Bills (3d Ed.) § 685; Bigelow, Bills, Notes & Cheques (2d Ed.) 109. An acceptance which makes a bill payable at a different city from that in which the drawee has his residence is a material departure from the tenor of the instrument, and presentment for payment at the place so designated in the acceptance will not necessarily charge the drawer. Niagara Dist. Bank v. Fairman & W. Machine Mfg. Co., 31 Barb. (N. Y.) 403.

⁸⁵ Mason v. Franklin, 3 Johns. (N. Y.) 202, semble. It has been said that such an instrument is to be treated as payable generally, and not as an instrument "by its terms payable at a special place," within the meaning of N. I. L. § 70. Bardsley v. Washington Mill Co., 54 Wash. 553, 103 Pac. 822, 132 Am. St. Rep. 1133 (N. I. L.). And it has been held (it seems erroneously) that where the maker of such an instrument has, since executing it, moved out of the state, no effort is necessary to present the instrument at the city at which made payable, on the ground that such an instrument is not strictly payable at a particular place. Leonard v. Olson, 99 Iowa, 182, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230.

⁸⁶ Mason v. Franklin, *supra*, semble; King v. Crowell, 61 Me. 244, 14 Am. Rep. 560, semble; King v. Holmes, 11 Pa. 456, semble; Herring v. Sanger, 3 Johns. Cas. (N. Y.) 71, semble; Baldwin v. Farnsworth, 1 Fairf. (10 Me.) 414, 25 Am. Dec. 252, semble; 3 Kent, Com. *96; Edwards, Bills (3d Ed.) § 682. Contra: Gibb v. Mather, 8 Bing. 214; Bank of United States v. Smith, 11 Wheat. 171, 6 L. Ed. 443, semble; Watkins v. Crouch, 5 Leigh (Va.) 522, semble; Ferner v. Williams, 37 Barb. (N. Y.) 9, semble; Parker v. Stroud, 98 N. Y.

upon this ground, or where a presentment to some person other than the maker, drawee, or acceptor, or his agent to make or refuse payment, is relied upon, the presentment, to be sufficient, must be made at the designated place.⁸⁷ Thus a presentment at a place of business of the maker, to the only person found on the premises, is not sufficient, where the instrument was made payable at another of the places of business of the maker.⁸⁸ Where the instrument is payable at a certain city, but not at any particular place within that city, a presentment there at a place of business (or, in its absence, of residence) of the maker, drawee, or acceptor is sufficient.⁸⁹ If no such place of business or residence is there it is clear;⁹⁰ and, although such a place is there, if it cannot after reasonable diligence, be discovered, it seems,⁹¹ that mere presence there with the instrument, for the purpose of collection, is sufficient. Where the instrument is, in terms, payable at any one of several places, a presentment at any one of them is sufficient, if it would be sufficient in case that were the only designated place of payment.⁹²

379, 50 Am. Rep. 685, *semble*; *McBride v. Illinois Nat. Bank*, 138 App. Div. 339, 121 N. Y. Supp. 1041, *semble*; *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861 (N. I. L.), *semble*. See N. I. L. §§ 70, 72, 73, 82.

⁸⁷ *Brown v. Jones*, 113 Ind. 46, 13 N. E. 857, 3 Am. St. Rep. 623.

⁸⁸ *Brooks v. Higby*, 11 Hun (N. Y.) 235.

⁸⁹ That is, going to a place of business of the maker, drawee, or acceptor in that city and making a reasonable attempt to find there some person authorized to make or refuse payment, is, in such a case, presentment. But such an attempt at any bank in that city or town is not sufficient. *Trease v. Haggan*, 107 Iowa, 458, 78 N. W. 58. See, however, *Hardy v. Woodroope*, 2 Stark. 319.

⁹⁰ *Wood v. Rosendale*, 18 Ohio Cir. Ct. R. 247; *Williams v. Planters' & Mechanics' Nat. Bank*, 91 Tex. 651, 45 S. W. 690. See note 52, p. 487, *supra*.

⁹¹ *Bigelow, Bills, Notes & Cheques* (2d Ed.) 111. See *Meyer v. Hibshner*, 47 N. Y. 265. Compare *Boot v. Franklin*, 3 Johns. (N. Y.) 207.

⁹² *Beeching v. Gower*, 1 Holt, N. P. 313. This was a case where a banker's promissory note was made payable at Tunbridge and also at London. It was held that presentment at London was sufficient, although, if presentment had been made at Tunbridge, the nearer and more convenient place, the note would have been paid.

Time of Presentment

Where presentment for acceptance is necessary, such presentment must be made within a reasonable time after the drawing or indorsing.⁹³ Otherwise, the drawer or indorser might be obliged to assume for an indefinite length of time the risk of the drawee's ability to pay, a result which would be contrary to the usual understanding among merchants in such transactions.⁹⁴ What is a reasonable time within which to make presentment for acceptance may, however, be extended by putting the bill into circulation.⁹⁵

⁹³ *Muilman v. D'Eguino*, 2 H. Bl. 553; *GOUZY v. HARDEN*, 7 Taunt. 159, Moore Cases Bills and Notes, 225.

⁹⁴ See *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Aymar v. Beers*, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538, and cases cited *supra*, p. 341.

⁹⁵ *Muilman v. D'Eguino*, 2 H. Bl. 565, per Buller, J.; *GOUZY v. HARDEN*, 7 Taunt. 159, Moore Cases Bills and Notes, 225; *Mellish v. Rawdon*, 9 Bing. 416; *Wallace v. Agry*, 4 Mason, 336, Fed. Cas. No. 17,096; *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259; *Thornburg v. Emmons*, 23 W. Va. 325. In *Wallace v. Agry*, *supra*, Story, J., said: "The party who receives a negotiable bill payable after sight has a right to sell it in the market where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it, or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation, or to send it to any other place for sale or remittance; and the only limitation upon this right is that he shall have it presented within a reasonable time, be the conveyance direct or indirect. * * * [He] is not at liberty to send it to very remote places, wholly out of the course of trade, if there be unreasonable delay thereby in the presentment for acceptance, and thus fix the drawer with an indefinite responsibility. But, on the other hand, the transmission in a direct trade is not necessary. No one can doubt that by the course of trade many bills of exchange drawn in Havana on England are sent to the United States for remittance or sale. * * * It would be a most inconvenient rule to hold that such a negotiation of bills was at the sole peril of the holder." By section 144, N. I. L., it is provided: "The holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time."

Presentment for payment⁹⁶ of a demand instrument,⁹⁷ whether it be a demand note,⁹⁸ a demand bill of exchange

⁹⁶ The standard of reasonable time in presentment for payment differs from such standard in presentment for acceptance, in that, under ordinary circumstances, the reasonable time for presentment cannot be extended by transfers of the instrument. *Moule v. Brown*, 4 Bing. N. C. 266; *Watt v. Gans*, 114 Ala. 264, 21 South. 1011, 1012, 62 Am. St. Rep. 99; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717; *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 77, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241. *Contra, Taylor v. Wilson*, 11 Metc. (Mass.) 44, 45 Am. Dec. 180, *semble*; *Angelatos v. Meridian Nat. Bank*, 4 Ind. App. 573, 31 N. E. 368. This rule of the law merchant states the usual practice in the case of demand instruments, under ordinary circumstances. But if it appears that with respect to a particular class of demand instruments the usual practice, and therefore the manifested intention, of the parties is that such instruments may be kept in circulation for a time before being put into the course of collection, it seems that a delay, by reason of such usual keeping in circulation, will not be unreasonable. It has, accordingly, been suggested that drafts drawn by one bank upon another are to be distinguished from ordinary checks with respect to what is a reasonable time for presentment for payment. *Nutting v. Burked*, 48 Mich. 241, 12 N. W. 184; *Montelius v. Charles*, 76 Ill. 303, 317.

⁹⁷ Where an instrument is left blank as to date of issue and time for payment, and the holder is authorized to fill in the blanks, it is not a demand instrument within the meaning of the rule stated. *Usefot v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290 (N. I. L.). See, also, note 26, p. 512, *infra*. Under N. I. L. § 7, an instrument payable at sight or on presentation is payable on demand. *First Nat. Bank of Omaha v. Whitmore*, 177 Fed. 397, 101 C. C. A. 401 (N. I. L.).

⁹⁸ *Turner v. Iron Chief Mining Co.*, 74 Wis. 355, 43 N. W. 149, 5 L. R. A. 533, 17 Am. St. Rep. 168. N. I. L. § 71, provides: "Where it [the instrument] is payable on demand presentment must be made within a reasonable time after its issue." N. I. L. § 191, defines "issue" as "the first delivery of the instrument, complete in form, to a person who takes it as a holder." It seems that, as to demand notes, the N. I. L. should be construed as declaratory of the rule of the law merchant as stated in the text. But no cases appear to have arisen in which the courts have considered the proper interpretation of this part of N. I. L. § 71. The corresponding section of the B. E. A. is much clearer: "Where a note payable on demand has been indorsed, it must be presented within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged." B. E. A. § 86 (1).

not drawn on a bank,²⁹ or a check,¹ must be made within a reasonable time from the making of the drawer's or in-

The general rule, as above stated, is applied by the Negotiable Instruments Law to the liability of the drawer of a check. N. I. L. § 186; Dehoust v. Lewis, 128 App. Div. 131, 112 N. Y. Supp. 559 (N. I. L.); GORDON v. LEVINE, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119, Moore Cases Bills and Notes, 232. But as to demand instruments in general that act provides: "Where it [the instrument] is payable on demand, presentment must be made within a reasonable time after its issue, except that, in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof." This section, literally construed, would establish as an implied term of the obligation of the drawer of a demand bill of exchange other than a check and of the indorser of any bill of exchange prior to an indorser who was a party to the last negotiation, a rule with respect to presentment for payment even more liberal to the holder than the rule above stated with respect to presentment for acceptance. Under this construction of the act, the obligations of these parties would cease, in substance, to be conditional upon presentment at any time other than that at which the holder should choose to make demand for payment. For the instrument could always be negotiated just before actual presentment, and thus the liability of all the indorsers be fixed, although parties subsequent to the indorsers sought to be bound might have been ever so negligent in delaying the presentment for payment. Under this construction, it would not be necessary to present the instrument even within the period of the statute of limitations, since the right of action against the drawer or indorser could not arise until after presentment and notice. This construction, which, it must be admitted, finds support in the exact wording of the section in question, has been suggested as correct. COLUMBIAN BANKING CO. v. BOWEN, 134 Wis. 218, 114 N. W. 451 (N. I. L.), Moore Cases Bills and Notes, 235. In that case the court states as a reason for this radical change in the law merchant: "Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment." Such a construction of the statute was, however, unnecessary to the decision reached in that case. The instrument in question was a bank draft, drawn by a local bank on a Chicago bank, payable to

²⁹ See note 93, supra.

¹ See note 93, supra.

dorser's contract.² The class of instruments to which the paper belongs is, however, important in determining what

the defendant, who indorsed the draft and mailed it to one Taggart, who was traveling in the West, at the city of Spokane, Wash., where he temporarily was. Taggart held the instrument from June 20, when he received it at Spokane, to July 14, when, at San Francisco, Cal., he negotiated the instrument to the plaintiff, which promptly presented the instrument for payment. From the character of the instrument and the fact that the indorsee of the defendant was traveling through the West, it might well have been held that some delay must have been or at least should have been contemplated by the defendant, and that as against him the presentment was within a reasonable time. See Nutting v. Burked, *supra*. The finding of the trial court was that the plaintiff was a holder in due course of the draft. This necessarily involved a finding that the draft was negotiated to the plaintiff bank within a reasonable time after the indorsement by the defendant. N. I. L. § 53. This finding of the trial court was expressly affirmed. 134 Wis. 224, 114 N. W. 451. In *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476 (N. I. L.), the court stated, as an additional ground for its decision, that as against an indorser of an ordinary check (not a bank draft) under section 71, N. I. L., "reasonable time for presentation and demand is to be reckoned from the last negotiation of the paper." The court construes the statute as giving to checks the function of a circulating medium. At 135 Iowa, 689 and 110 N. W. 30, 31, the court say: "Checks are an almost universal substitute for money. They pass from hand to hand, bank to bank, and city to city, and, within reasonable limits, it may be said that, no matter how long they remain outstanding, *so long as one negotiation* promptly follows another and the checks are in fact in circulation, the statute requires us to hold that the indorser is not legally prejudiced by the consequent delay in their presentation for payment." This language seems to give to section 71, N. I. L., the effect of making applicable to the presentment for payment of demand bills of exchange the former rule as to presentment for acceptance, where necessary, as declared in section 144, N. I. L., sub-

² *Pollard v. Bowen*, 57 Ind. 232. The conditions of the promise of the drawer or indorser are not complied with if there is, in the aggregate, as to him, an unreasonable delay in making presentment for payment. By which holder the unreasonable delay is caused is, on principle, immaterial. See *GIFFORD v. HARDELL*, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925, Moore Cases Bills and Notes, 229. But see note 96, *supra*. Where, however, the delay is due to the negligence of an independent agency for transmission, which has been selected with reasonable care, such delay is not unreasonable. See N. I. L. § 81. See *infra*, p. 503.

is, in a particular case, a reasonable time.⁸ Thus it has been held that a demand note payable with interest, since such an instrument is usually intended as a continuing obligation, may be presented at any time within the period of the statute of limitations applicable to the maker's obliga-

ject to the modification expressly made by section 186. Upon the petition for a rehearing of this case, the unjust consequence of this construction of section 71, in making the standard of reasonable time for presentment different as between the drawer and indorser of a check was pointed out to the court, and the contention made that section 71 could not have been intended to have any application to checks. The court, however, refused to consider this objection, on the ground that an expression of opinion upon this point was unnecessary to the decision of the case. A rehearing was denied. *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 113 N. W. 476. The constructions of section 71 suggested by these cases are opposed to the purpose of the act as gathered from other sections. The act expresses a legislative intention to retain in substance the two conditions of the drawer's and indorser's obligation. N. I. L. §§ 65, 70, 81, 82. It also contemplates a distinction between presentment for acceptance and for payment, with respect to what is a reasonable time for presentment. N. I. L. §§ 71, 144. In the light of these considerations it would seem reasonable to construe section 71 of the act as laying down a rule applicable only to the liability of the indorser who was a party to the last negotiation, or as declaring the rule that presentment must be made within a reasonable time after the negotiation of the instrument by the person sought to be charged, using the word "negotiation" to express a transfer by unqualified indorsement or a completion by delivery of the contract of the drawer. So construed, the statute declares the former rule of the law merchant as stated in the English Bills of Exchange Act, § 45 (2). This is the result reached in *First Nat. Bank of Chadwick v. Mackey*, 157 Ill. App. 408 (N. I. L.), where the question was directly involved. The court there said: "It cannot be the meaning of such sections (N. I. L. §§ 71, 186, 193) that a check may be sent for collection in a round-about way through many banks, and that a reasonable time for its presentment begins after the last time it is sent on for collection." This construction of section 71, so far as it applies to bills of exchange, is strengthened by the similar liberal interpretation which should be given to the part of that section relating to demand notes. See note 97, infra. See, also, *Hannon v. Allegheny Bellevue Land Co.*, 44 Pa. Super. Ct. Rep. 286 (N. I. L.); *Gate City Nat. Bank v. Schmidt*, 168 Mo. App. 53, 152 S. W. 101 (N. I. L.).

⁸ N. I. L. § 193. See note 96, supra.

tion.⁴ The more general and better view, however, is that the facts that the instrument is a note and that it is payable with interest are to be considered in determining, but are not conclusive as to, what is a reasonable time for presentment.⁵ With respect to checks prompter presentment is necessary.⁶ The reason for this difference is that usually a check is drawn and delivered as a substitute for money.⁷ The expectation of the parties, therefore, ordi-

⁴ *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Parker v. Stroud*, 98 N. Y. 379, 50 Am. Rep. 685; *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

⁵ *Field v. Nickerson*, 13 Mass. 131; *Martin v. Winslow*, 2 Mason, 241, Fed. Cas. No. 9,172; *Keyes v. Fenstermaker*, 24 Cal. 329; *Turner v. Iron Chief Mining Co.*, 74 Wis. 355, 43 N. W. 149, 5 L. R. A. 533, 17 Am. St. Rep. 168; *Leonard v. Olson*, 99 Iowa, 162, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230; *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305. This is the rule adopted by N. I. L. § 71. COMMERCIAL NAT. BANK OF SYRACUSE v. ZIMMERMAN, 185 N. Y. 210, 77 N. E. 1020 (N. I. L.), *Moore Cases Bills and Notes*, 238; *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.). In some states what is to be deemed a reasonable time for the presentment of a demand note has been fixed by statute. See *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987 (N. I. L.). Although where such statute was passed prior to the adoption of the N. I. L. in the state in question, such statute is no longer controlling, it establishes a standard which will be taken judicial notice of as the proper standard in ordinary cases, until the existence of some different customary standard is brought to the notice of the court. *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987 (N. I. L.). A standard for ordinary cases is sometimes fixed by decision. Thus a delay of ten years after the date of a demand note is *prima facie* unreasonable. *Leonard v. Olson*, 99 Iowa, 162, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230. Even a delay of two years has been held *prima facie* unreasonable. *Gerke Brewing Co. v. Busse*, 11 Ky. Law. Rep. 322. It should be noted in connection with these cases that a showing of presentment within a reasonable time is, as against an indorser, a part of the plaintiff's case. *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987 (N. I. L.); COMMERCIAL NAT. BANK OF SYRACUSE v. ZIMMERMAN, 185 N. Y. 210, 77 N. E. 1020 (N. I. L.), *Moore Cases Bills and Notes*, 238, overruling *German American Bank v. Mills*, 99 App. Div. 312, 91 N. Y. Supp. 142.

⁶ *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304, affirmed 13 Wend. (N. Y.) 133, 27 Am. Dec. 192; *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499.

⁷ *GORDON v. LEVINE*, 194 Mass. 418, 80 N. E. 505, 10 L. R. A.

narily is that it will be presented for payment very promptly. What is a reasonable time for the presentment of a check (in ordinary situations) is also more definitely fixed than in the case of a demand note. Thus, where the holder receives the check in the same city or town in which the drawee bank is located, in the absence of unusual circumstances, the check must be presented during banking hours of the secular day next following the day of its receipt by him.⁸ If the drawee bank is located in some other city or

(N. S.) 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119 (N. I. L.), Moore Cases Bills and Notes, 232. *Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559 (N. I. L.).

⁸ *Alexander v. Burchfield*, 7 Man. & G. 1061, 11 Law J. C. P. 253; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690; *Blickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 89 Am. Dec. 436; *GRANGE v. REIGH*, 93 Wis. 552, 67 N. W. 1130, Moore Cases Bills and Notes, 231; *Brown v. Schintz*, 202 Ill. 509, 67 N. E. 172; *Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. 762; *Edmisten v. Henry Herpolshemer Co.*, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934; *School Dist. No. 57 of Logan County v. Eager*, 19 Okl. 235, 91 Pac. 847; *Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559 (N. I. L.); *GORDON v. LEVINE*, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119 (N. I. L.), Moore Cases Bills and Notes, 232. This rule, as indicated by its terms, applies where the holder deposits the check for collection or credit in a bank in the same city or town where he received the check and where the drawee bank is located. *Edmisten v. Henry Herpolshemer Co.*, supra; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690; *Knickerbocker Trust Co. v. Miller*, 156 App. Div. 810, 142 N. Y. Supp. 440 (N. I. L.). Where the check is received after banking hours, it has been held that, where the holder and drawee are located in the same city, presentment is within a reasonable time if made on the second day thereafter. *Loux & Son v. Fox*, 171 Pa. 68, 33 Atl. 190; *Willis v. Finley*, 173 Pa. 28, 34 Atl. 213. In the former case, the reasoning of which is given as the basis for decision in the latter, the court took judicial notice of the usual practice of merchants in depositing checks for collection, and held that such practice was in harmony with treating the check as delivered on the following day, since nothing could ordinarily be done to secure its presentment on that day. Both these cases were, in *Hannon v. Allegheny Bellevue Land Co.*, 44 Pa. Super. Ct. Rep. 266 (N. I. L.), referred to as deciding only that where delivery of a check was after banking hours that day is to be treated as dies non in determining whether or not presentment was within a reasonable time.

town, the check must be mailed or sent by some other usual mode of transmission on the secular day next following the day of its receipt to that city or town for presentment, and the person at that city or town to whom it is sent must present it not later than the next secular day following its receipt by him.⁹ These rules state what is business practice

See, also, dissenting opinion of Delaney, J., in *Zaloom v. Ganim*, 72 Misc. Rep. 36, 129 N. Y. Supp. 85 (N. I. L.). In *Edmisten v. Henry Herpolsheimer Co.*, *supra*, *Loux & Son v. Fox and Willis v. Finley*, *supra*, were expressly disapproved, the court holding that, where the checks were received after banking hours in the city in which the drawee bank was located, presentment must be on or before the following day, even though there is a general practice in that city to the contrary. See, also, note —, *infra*. In the same jurisdiction, however, the receipt of a check after banking hours makes reasonable a presentment upon the following day, where otherwise, by reason of the knowledge or suspicion on the part of the holder of the insolvency of the drawee bank, an effort to make presentment on the day of receipt would be necessary. *Temple v. Carroll*, 75 Neb. 61, 105 N. W. 989. If the day following the day the check is received is Sunday or a legal holiday, presentment on the second day after such receipt is within a reasonable time. *O'Brien v. Smith*, 1 Black. 99, 17 L. Ed. 64. These rules as to the time for presentment of checks, as indicated in the text, describe a standard for ordinary cases only. As to what facts may in a particular case be sufficient ground for considering a longer time reasonable, see —, *infra*. These rules, moreover, as stated in the text, apply only to ordinary checks, namely, the class of checks intended for immediate payment and not usually intended for circulation or retention as evidences of indebtedness. For this reason the court in *Hannon v. Allegheny Bellevue Land Co.*, *supra*, seems to have erred in applying these rules to a "teller's check" drawn by the executive officer of a bank upon that bank, payable to the defendant, and by him indorsed as a payment on a land contract. See N. I. L. §§ 130, 185, 186, 188. See, also, note 93, *supra*. As to what are banking hours, see *Knickerbocker Trust Co. v. Miller*, 156 App. Div. 810, 142 N. Y. Supp. 440 (N. I. L.).

⁹ *Hare v. Henty*, 30 Law J. C. P. 302; *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Smith v. Janes*, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; *Northwestern Coal Co. v. Bowman*, 69 Iowa, 150, 28 N. W. 496; *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132; *Hough v. Gearen*, 110 Iowa, 240, 81 N. W. 463. See *Hamlin v. Simpson*, 105 Iowa, 125, 74 N. W. 906, 44 L. R. A. 397; *Haggerty v. Baldwin*, 131 Mich. 187, 91 N. W. 150; *Williams v. Brown*, 53 App. Div. 486, 65 N. Y. Supp. 1049 (N. I. L.); *Citizens'*

in ordinary cases. A failure to comply with them is *prima facie* a failure to make presentment for payment within a reasonable time.¹⁰ But they do not preclude a finding in a particular case that a longer delay was, under all the circumstances, reasonable.¹¹ The Negotiable Instruments Law provides: "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."¹² In other words, there are factors other than the nature of the instrument to be considered in determining what is a reasonable time for presentment for payment.¹³ Any other indication of the actual intention of the parties as to when the instrument shall be paid is important.¹⁴ Thus evidence of verbal statements or other conduct at the time of drawing or indorsing, although it could not be introduced to show a modification of a written contract, may be introduced to show that the time taken for presentment was reasonable.¹⁵ *A fortiori* the

Bank of Pleasantville v. First Nat. Bank of Pleasantville, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303 (N. I. L.).

¹⁰ *Pelt v. Marlar*, 95 Ark. 111, 128 S. W. 554.

¹¹ See *Freiberg v. Cody*, 55 Mich. 108, 20 N. W. 813; *Cox v. Boone*, 8 W. Va. 500, 23 Am. Rep. 627; *Firth v. Brooks*, 4 L. T. N. S. 467.

¹² N. I. L. § 193.

¹³ *Yates v. Goodwin*, 96 Me. 90, 94, 95, 51 Atl. 804.

¹⁴ *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.). Thus where the drawer, at his own place of business, delivers a check to an agent of the payee having no authority to indorse it, he impliedly consents to such additional time for presentment as may be necessary for the transmission of the check to the principal of such agent. *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132.

¹⁵ *Pollard v. Bowen*, 57 Ind. 232, 236, 237. In that case the complaint alleged as an excuse for delay in presentment of the check a verbal agreement, made between drawer and payee at the time of issue, that the payee should not present the check until he actually needed the money, a situation which was not contemplated as certain to happen within several months. The complaint being otherwise sufficient, a judgment overruling a general demurrer was affirmed. Accord: *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952; *Becker v.*

subsequent statements and conduct of the party sought to be charged are relevant.¹⁶ Informal requests for payment, not amounting to presentments, have also been considered in determining what is a reasonable time for presentment.¹⁷ And where the holder of the instrument has reason to suspect the impending insolvency of the maker, drawee, or ac-

Horowitz (Sup.) 114 N. Y. Supp. 161 (N. I. L.); *Sheffield v. Cleland*, 19 Idaho, 612, 115 Pac. 20 (N. I. L.), construing N. I. L. §§ 71, 193. See *infra*, pp. 555, 556. Contra: *Perry v. Green*, 19 N. J. Law, 61 38 Am. Dec. 536; *Foley v. Emerald & Phenix Brewing Co.*, 61 N. J. Law, 428, 39 Atl. 650. In the case last cited a demand note was executed to the defendant, who immediately indorsed it to the plaintiff. There was a verbal understanding between the defendant and the maker that the maker was to pay \$5 per week on the note until paid. These payments were continued until the thirty-sixth week after issue, when the maker failed to make the weekly payment. The plaintiff, within a few days thereafter presented the note for the payment of the balance, which was refused, and notice duly given to the defendant. The trial court, on this evidence, entered judgment for the plaintiff. This judgment was reversed, upon the ground that the delay in presentment was *prima facie* unreasonable, because it was for the indulgence of the maker, and that the parol evidence of the verbal agreement for payment by installments should not have been admitted, because the obligation of the defendant was "a precise agreement, constructed by the law merchant upon the tenor of the note, which cannot be varied by parol evidence of any preceding or contemporaneous oral arrangement."

¹⁶ No delay to which the drawer or indorser consents can, as to him, be unreasonable. *Yates v. Goodwin*, 96 Me. 90, 95, 51 Atl. 804. See, also, *Bacon's Adm'r v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576. In *Oley v. Miller*, 74 Conn. 304, 308, 50 Atl. 744, 746, the court said: "Waiver through requests for forbearance is but the name for a subordinate factor in the larger or final question of reasonableness of presentation." See note 99, p. 565, *infra*.

¹⁷ Such requests for payment by the holder indicate that he desires the payment of the primary obligation. If, thereafter, he delays presentment, he is showing leniency to the maker at the risk of the indorser. Ordinary fair dealing requires, where the holder has been put on guard by the refusal of such informal request, that thereafter he use greater diligence to secure prompt payment from the primary obligor. *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625; *State of New York Nat. Bank v. Kennedy*, 145 App. Div. 669, 130 N. Y. Supp. 412 (N. I. L.); *COMMERCIAL NAT. BANK OF SYRACUSE v. ZIMMERMAN*, 185 N. Y. 210, 77 N. E. 1020 (N. I. L.), *Moore Cases Bills and Notes*, 238.

ceptor, he must make prompter presentment.¹⁸ The loss, without negligence, of the instrument and the consequent delay lengthen the period which is reasonable.¹⁹ In short, any fact or circumstance which would cause an ordinarily reasonable man of the class usually dealing in these instruments to vary from the time usually taken for presentment is to be considered in determining whether or not, in a particular case, there has been a compliance with the conditions of the drawer's or indorser's obligation.²⁰

¹⁸ *Anderson v. First Nat. Bank*, 144 Iowa, 251, 122 N. W. 918, 138 Am. St. Rep. 288 (N. I. L.); *Citizens' Bank of Pleasantville v. First Nat. Bank of Pleasantville*, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303 (N. I. L.), *semble*. *Contra*: *Northwestern Iron & Metal Co. v. National Bank of Illinois*, 70 Ill. App. 245. In the latter case the court said: "This element should not be considered. The contract is made with the understanding that the holder is to have until the close of banking hours on the day following his receipt of the check." See *Temple v. Carroll*, 75 Neb. 61, 105 N. W. 989; *Babcock v. City of Rockyford* (Colo. App.) 137 Pac. 890.

¹⁹ See *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925 (N. I. L.).

²⁰ "It is not a question of what it is possible for banks to do, but one of what they do do." *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 88, 52 S. E. 1017, 1022, 4 L. R. A. (N. S.) 132. Accordingly it was there held that, where the only available mail, leaving the town in which the holder bank was located on the day following its receipt of the check, was at 10 a. m., to send the check by that mail would, in the light of the usual banking hours throughout that state be exacting more than reasonable diligence, and that forwarding the check by the next following mail was *prima facie* sufficient. But the mere fact that the payee or the local bank to which the instrument is indorsed for collection, has no correspondent at the place where the drawee bank is located, does not make reasonable an unusual delay. *Watt v. Gans*, 114 Ala. 264, 21 South. 1011, 62 Am. St. Rep. 99, *semble*. See *Sublette Exch. Bank v. Fitzgerald*, 168 Ill. App. 240 (N. I. L.); *Heinrich v. First Nat. Bank*, 83 Misc. Rep. 566, 145 N. Y. Supp. 342 (N. I. L.). And the mere fact that a draft is payable in "current funds," and the holder for collection is uncertain as to what to accept in payment, is not a reasonable ground for delay. *Phoenix Ins. Co. v. Gray*, 13 Mich. 191. So in *Hannon v. Allegheny Bellevue Land Co.*, 44 Pa. Super. Ct. 266, it was held that an otherwise unreasonable delay in presentment is not reasonable because the person who received the check mistakenly thought that it was

Not only may such circumstances be considered, but direct evidence may be introduced to show what is the practice of men usually dealing in instruments of the same class as the one in question, with respect to the time taken for presentment.²¹ What is usual among such men is rea-

insufficient in amount, and had postponed presenting it in order to find the maker, so as to have the amount corrected. See *Young v. Exch. Bank of Ky.* (Ky.) 153 S. W. 144 (N. I. L.).

²¹ This seems to be the correct view, independently of the N. I. L. *Shute v. Robbins*, Mood. & M. 133; *Scott v. Lifford*, 9 East, 347; *Loux & Son v. Fox*, 171 Pa. 68, 33 Atl. 190, semble; *Willis v. Finley*, 173 Pa. 28, 34 Atl. 213, semble; *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132, semble; *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476 (N. I. L.), semble; *GORDON v. LEVINE*, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119 (N. I. L.), *Moore Cases Bills and Notes*, 232, semble; *Zaloom v. Ganim*, 72 Misc. Rep. 36, 129 N. Y. Supp. 85 (N. I. L.), semble. Contra: *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499, semble; *Edmisten v. Henry Herpolsheimer Co.*, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934; *Gregg & Co. v. Beane*, 69 Vt. 22, 37 Atl. 248; *Travers v. T. M. Sinclair & Co.*, 122 Ill. App. 203. See *Suse v. Pompe*, 8 C. B. (N. S.) 538; *Sublette Exch. Bank v. Fitzgerald*, 168 Ill. App. 240 (N. I. L.); *Youmans Jewelry Co. v. Blackshear Bank* (Ga.) 80 S. E. 1005. A fortiori, the usual practice may be considered where it is so well known that the court can take judicial notice of it. *Loux & Son v. Fox*, supra; *Willis v. Finley*, supra; *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132; *Sublette Exch. Bank v. Fitzgerald*, 168 Ill. App. 240 (N. I. L.). See, also, *Guelich v. National State Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110. Contra: *Edmisten v. Henry Herpolsheimer Co.*, supra. Compare *Moule v. Brown*, 4 Bing. (N. C.) 266; *Alexander v. Burchfield*, 49 Eng. C. L. Rep. 1061. In *Gregg & Co. v. Beane*, supra, the trial court found that the course taken for presentment, namely, depositing the check in a local bank, which sent it on to a reserve bank, which bank in turn sent it on to a correspondent near the drawee bank, for collection, was according to the usual practice, and therefore gave judgment for the plaintiff. In reversing this judgment the Supreme Court said (69 Vt. 26): "The plaintiff's claim that the finding of the court below that this check was forwarded for collection in the usual way is conclusive upon the question of diligence. But this cannot be so unless it is considered that any change of method, which grows into a settled practice, of itself works a modification of the law. * * * When the custom of one period

sonable.²² The explanation of this admissibility of direct evidence as to what is the usual course pursued is, it seems, that the implied obligation of the indorser is determined

has resulted in the adoption of a definite legal rule, the development of a new custom will not effect a modification of the rule in advance of judicial sanction." The court not only refused to consider the custom as conclusive, but held that it was not a special circumstance making the general rule as to checks inapplicable. 69 Vt. 26, 37 Atl. 249. In its reasoning and result this case finds a counterpart in *Edmisten v. Henry Herpolsheimer Co.*, *supra*. In that case the drawer, drawee, and payee did business in the city of Lincoln, where the check was issued. Presentment was not made before the close of the day following delivery. In holding that presentment was not made within a reasonable time the court through Albert, C., says: "The special circumstances relied on are that the collection of such paper in the city of Lincoln is made through the agency of a clearing house, and that the check, having been received after business hours, could not, in the usual course of business, pass through the clearing house and be presented for payment on the day following receipt by them. This position is sustained by two opinions, both from the same court and delivered by the same judge. *Loux & Son v. Fox*, 171 Pa. 68, 33 Atl. 190; *Willis v. Finley*, 173 Pa. 28, 34 Atl. 213. In the opinions referred to a departure from the settled rules of the law merchant is impliedly admitted. An attempt to justify such departure is made on the grounds of a custom among banks, and the impossibility, owing to the volume of business, of conforming to the established rule. The reasoning does not commend itself to our judgment. We do not believe a party should be permitted to excuse a lack of diligence by showing that such lack is customary among those engaged in like business in the same city, nor to plead the magnitude of his business as an excuse for failure to prosecute it with diligence. The special circumstances which will excuse delay in presentment have generally been held to be such as are beyond the holder's control, or arise from some agreement or understanding between the drawer and some one or more of the other parties to the paper." Upon rehearing this decision was adhered to, upon the opinion of Oldham, C., concurred in by Barnes and Pound, C.C.; Sedgwick, J., dissenting. The decision of the majority in this case may possibly have been the result of viewing the practice in question as confined to the city of Lincoln. In neither of the opinions, however, is this distinction suggested. But whether the decision proceeded on the ground that the custom, so far as the court could consider it, was confined to

²² See citations in note 20, *supra*, particularly the dissenting opinion of Sedgwick, J., in *Edmisten v. Henry Herpolsheimer Co.* and the opinion of the court in *Plover Savings Bank v. Moodie*.

by the practice (customs) of merchants and is a part of the law merchant. What is a reasonable time is a question of mercantile practice, of the law merchant. It is to be an-

the city of Lincoln, or that no custom, no matter how general, could be considered in determining what is a reasonable time for the presentment of a check, it seems to be erroneous. If decided on the first ground, it seems erroneous because the majority of the court should, with Sedgwick, J. (see 66 Neb. pages 103, 105, 92 N. W. 138, 59 L. R. A. 934) have taken judicial notice of the practice of merchants and bankers in accordance with this custom in Lincoln, and in all cities of any considerable size in that jurisdiction. If decided on the second ground, it seems erroneous, as also seems the decision in Gregg & Co. v. Beane, *supra*, because of a false conception of the nature of the law merchant in general, and particularly of the rule of the law merchant here sought to be applied. Assuming, as stated in the text, that what is a reasonable time for presentment is not a question of fact, but of commercial law, the standard set by the rules of commercial law can still be modified by practice among bankers and business men dealing in this class of instruments. *Goodwin v. Robarts*, 1 A. C. 476; *Bechuanaland Co. v. London Trad. Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler*, [1902], 2 K. B. 144. But see *Jackson v. York & C. R. Co.*, 48 Me. 147; *Evertson v. National Bank of Newport*, 66 N. Y. 14, 23 Am. Rep. 9. See § 1, Chapter I, *supra*. This is particularly true with respect to the rules of the law merchant fixing the conditions of the liability of the drawer or indorser, for such rules merely make more specific the implied general condition that reasonable diligence be exercised. See *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269; *Barnett v. Elwood Grain Co.*, 153 Mo. App. 458, 133 S. W. 856; *Grand Bank v. Blanchard*, 40 Mass. (23 Pick.) 305, 306; *Burke v. McKay*, 43 U. S. (2 How.) 66, 11 L. Ed. 181. It is to be noted that immediately after the decision in Gregg & Co. v. Beane, *supra*, was handed down, a statute was enacted in Vermont providing that the forwarding of a check or draft in the usual course of business should be considered due diligence in its collection. Section 2686, Pub. St. Vt. 1906. Section 193, N. I. L., provides: "In determining what is a 'reasonable time,' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." In *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, rehearing denied 113 N. W. 478 (N. I. L.), the court held that the presentment of a check according to the usual practice, but not within the time prescribed by the general rule, was within a reasonable time. The rejection by the lower court of evidence offered by the defendant to show that he did not know of any such practice was affirmed. Accord: *Zaloom v. Ganim*, 72 Misc. Rep. 36, 129 N. Y. Supp. 85 (N. I. L.); *State of New York*

swered by finding out what the law merchant is. The testimony of merchants is one of the means by which the court informs itself as to the content of the law merchant.

What is a reasonable time for presentment is thus, it seems, a question of law for the court.²³ The rule, as gen-

Nat. Bank v. Kennedy, 145 App. Div. 689, 130 N. Y. Supp. 412 (N. I. L.). Compare Williams v. Brown, 53 App. Div. 486, 65 N. Y. Supp. 1049 (N. I. L.); First Nat. Bank of Chadwick v. Mackey, 157 Ill. App. 408 (N. I. L.). See Chalmers, *Dig. Bills* (7th Ed.) 275. The usage of trade must, however, relate to the time for presentment of the class of instruments in question. Accordingly in Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987 (N. I. L.), the court refused to consider the usual practice of giving credit for 30, 60, or 90 days in determining whether or not the demand note had been presented within a reasonable time. No attempt was made to distinguish the view taken by Parker, C. J., in Field v. Nickerson, 13 Mass. 131, 132, but the decision was based upon the terms of section 193, N. I. L., which the court said (181 Mass. 72, 62 N. E. 989), "limits the question of usage to that of trade or business 'with respect to such instruments.'" The consideration of mercantile practice as determining what is a reasonable time for presentment is to be distinguished from a conclusion that the parties *prima facie* contracted with reference to a custom, prevailing in a particular business or locality, as to the proper time within which to present certain kinds of demand instruments for payment, and that, therefore, such a question must be considered, as an expression of the intention of the parties, in determining whether or not presentment was within a reasonable time. Thus in Bridgeport Bank v. Dyer, 19 Conn. 136, 139, 140, the court said: "No principle of law is better settled than that a known practice or one belonging to a particular branch of business is sufficient evidence of the understanding of the parties, when contracting in relation to that business, unless there is evidence to the contrary. * * * We are not now inquiring after the law, or any custom as a rule of law, but after the understanding and agreement of the parties." See Jones v. Fales, 4 Mass. 245; Maine Bank v. Smith, 18 Me. 99; Field v. Nickerson, 13 Mass. 131, 132. See, also, Williams v. Brown, 53 App. Div. 486, 65 N. Y. Supp. 1049 (N. I. L.); Travers v. T. M. Sinclair & Co., 122 Ill. App. 203; First Nat. Bank of Chadwick v. Mackey, 157 Ill. App. 408 (N. I. L.); Knickerbocker Trust Co. v. Miller, 156 App. Div. 810, 142 N. Y. Supp. 440 (N. I. L.).

²³ Gregg & Co. v. Beane, 69 Vt. 22, 37 Atl. 248; Yates v. Goodwin, 96 Me. 90, 51 Atl. 804; COMMERCIAL NAT. BANK OF SYRACUSE v. ZIMMERMAN, 185 N. Y. 210, 77 N. E. 1020 (N. I. L.); Moore Cases Bills and Notes, 238; Loux & Son v. Fox, 171 Pa. 68, 33 Atl. 190; Pollard v. Bowen, 57 Ind. 232. Contra: Hampton v. Miller,

erally stated, is that where the facts as to time, declarations of intention, etc., are admitted, or there is no conflict in the testimony as to such facts, it is for the court to decide whether or not the presentment was within a reason-

78 Conn. 287, 61 Atl. 952; Tomlin v. Thornton, 99 Ga. 585, 27 S. E. 147. See *Citizens' Bank of Pleasantville v. First Nat. Bank of Pleasantville*, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303 (N. I. L.). It has been suggested that this addition to the duties of the court resulted from the great variations between the verdicts of jurors, including the special juries of merchants, as to what were reasonable periods of time in similar cases, and the necessity for greater uniformity in decisions. Chitty & Hulme, Bills (13th Am. Ed.) *379. As stated in the text, a more reasonable explanation is, it seems, to be found in the nature and history of the law merchant, by which the implied terms of the obligation of the drawer and indorser are determined. Originally mercantile controversies were not tried in the common-law courts, but in separate mercantile courts, which administered justice between parties according to the general practices of merchants; that is, according to the law merchant. When the common-law courts took jurisdiction of mercantile controversies, they tried to apply, at least to some extent, the law merchant. One of the methods of determining a controversy according to the law merchant was to try the case by a special jury of merchants. See *Aske, Customs & Usages of Trade*, pp. 20, 21. Under this practice the determination of what was a reasonable time for the presentment of a demand instrument would, of course, be left to the jury of merchants. Later the common-law courts took upon themselves the function of determining what the law merchant was. But they still frequently obtained the opinions of special juries of merchants upon the customs and practices of merchants, including the practice as to the time of presentment. Thus in *Scott v. Lifford*, 9 East, 347, Grose, J., said: "Whether due diligence has been used is a question of law; but judges may take the opinion of a jury as to what is convenient in the manner of giving notice." See, also, *Rickford v. Ridge*, 2 Camp. 537. This use of the special jury of merchants has become almost obsolete. In its stead we find the courts permitting the introduction, before the common-law jury, of evidence of custom. See cases cited in note 21, *supra*. The jury returns a verdict as to the content of the custom. This verdict adds to the information of the court concerning general mercantile practice; that is, the law merchant. He may consult any other source before deciding what is the law merchant applicable to the particular situation. In *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132, the court said: "In the exercise of the power to determine what is a reasonable time, according to the law merchant, the courts have always taken judicial

able time.²⁴ Where, however, there is a conflict of testimony as to such facts, it is generally said that the question whether or not the presentment was within a reasonable time should be left to the jury with proper instructions from the court.²⁵

If a bill or note is payable at a given date, or at a given time after date, demand, or sight,²⁶ the presentment for

notice of some of those customs, habits, and practices which may be deemed to be part of the knowledge and information of the people generally, and also the customs and practices peculiar to banks and other financial and commercial institutions." Thus, although the jury is used in getting at the standard of reasonable time fixed by the general practice of merchants, this general practice still forms a distinct body of law, the application of which to the facts of a particular case is a function of the court.

²⁴ Cases cited in note 21, *supra*.

²⁵ Cases cited in note 21, *supra*. This conclusion is entirely consistent, it seems, with the statement that the question of the reasonableness of the time taken for presentment is not "a mixed question of law and fact," but simply a question of law. Where permissible under the rules of practice, it would seem proper, where there is conflicting evidence, for the court to directly determine the reasonableness of the time taken for presentment under the facts of the case as found by the jury in a special verdict. See Chitty & Hulme, *Bills* (13th Am. Ed.) *379.

²⁶ Some difficulty arises in determining what is a note payable at a given date, or at a given time after date, demand, or sight, within the meaning of the rule stated. Where a certificate of deposit was made payable on its surrender, properly indorsed, but recited, "To be left six months," and "No interest after maturity," it was held that as between the holder and the indorser it matured on the last day of grace after the expiration of six months from its date. *Towle v. Starz*, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463. But an instrument payable "on demand after date" has been held not to mature at a given time as between holder and indorsers. *Foley v. Emerald & Phoenix Brewing Co.*, 61 N. J. Law, 428, 39 Atl. 650. And an instrument so payable has been treated as payable on demand within the meaning of the following provision contained in N. I. L. § 71: "Where an instrument is not payable on demand, presentment must be made on the day it falls due." *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.). See the dissenting opinion of Buck, J., in *Towle v. Starz*, *supra*. See p. 497, *supra*. Where a series of negotiable notes payable at different times were executed, together with collateral written agreement providing that on default in the payment of any one all of the others should be at once due, it was held that upon default in the payment of one of the

payment, to be sufficient, must be made on the day when, by its terms, the instrument is due.²⁷ This does not mean the day expressly designated in the instrument, but the last day of the additional days of grace, according to the practice of merchants.²⁸ Lord Holt, in 1701, in *Tassell v.*

notes the person who held the others, and who was a party to the collateral agreement, was entitled according to a correct interpretation of that agreement, to a reasonable time after such default in which to make presentment and give notice of dishonor to the defendant indorser, who was also a party to the collateral agreement. *Creteau v. Foote & Thorne Glass Co.*, 40 App. Div. 215, 57 N. Y. Supp. 1103. As to collateral agreements purporting to accelerate the time of payment of the instrument, see p. 442, *supra*. That the holder has an option to demand payment at any time does not necessarily make the instrument payable on demand, or, if not so payable, show that it has matured within the meaning of this rule. See *Useof v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290 (N. I. L.). Thus a certificate of deposit "payable on return of this certificate 12 months after date, with interest * * * for the time specified only, payable in 6 months, if desired, with interest, * * * no interest after due," is not as between the holder and indorser, due at the end of six months. *Citizens' Bank of Los Angeles v. Jones*, 121 Cal. 30, 53 Pac. 354. See p. 442, *supra*. And even where, by the terms of the instrument, it is to become due upon the happening of a named contingency, the instrument is generally construed as merely giving the holder such an option to declare the instrument due, and not as becoming due, as between the holder and indorser, upon the happening of the contingency. See *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 284, 10 Sup. Ct. 999, 34 L. Ed. 349. See p. 442, *supra*. But it seems that where the holder, who by the terms of the instrument, expressed upon its face, has such an option, does some act in exercise of that option, showing that he treats the instrument as due, he must, as against an indorser, treat the instrument as maturing upon the day of that act. *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113 (N. I. L.).

²⁷ *Mechanics' Bank at Baltimore v. Merchants' Bank at Boston*, 47 Mass. (6 Metc.) 13; *Towle v. Starz*, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463; *Demelman v. Brazier*, 193 Mass. 588, 79 N. E. 812 (N. I. L.). See, however, *Freeman v. Boynton*, 7 Mass. 483, where it was held that, if the holder and maker of a note reside in different towns, the holder may retain the note at his place of business during the day of maturity and is entitled to a reasonable time after that date in which to make presentment.

²⁸ Thus a statute abolishing days of grace cannot constitutionally apply to mercantile obligations already made. *Wood v. Rosendale*, 18 Ohio Cir. Ct. Rep. 247. See *President, etc., of City Bank v. Cut-*

Lewis,²⁰ thus expounds the rule: "In case of foreign bills of exchange, the custom is that three days are allowed for payment of them; and, if they are not paid upon the last of the said days, the party ought immediately to protest the bill and return it, and by this means the drawer will be charged. But, if he does not protest it on the last of the three days, which are called the 'days of grace,' there, although he upon whom the bill is drawn fails, the drawer will not be chargeable, for it shall be reckoned his folly that he did not protest. But if it happens that the last day of the said three days is a Sunday or a great holiday, as Christmas Day, upon which no money used to be paid, there the party ought to demand the money upon the second day;²¹ and, if it be not paid, he ought to protest the bill the second day; otherwise, it will be at his own peril, for the drawer will not be chargeable." These rules apply alike to foreign and inland bills and promissory notes,²¹ and to paper payable in installments; grace being allowed upon each installment.²² They are, however, very generally modified by statute. While days of grace were retained, statutes in several states adopted generally the rule otherwise governing only bills or notes payable without grace, which allows payment on the next succeeding business day, because, the debtor not being compelled to do business or make payment on a holiday, the next day is the first legal time at which the creditor can demand pay-

ter, 20 Mass. (3 Pick.) 414; *Hammond, Snyder & Co. v. American Express Co.*, 107 Md. 295, 68 Atl. 496.

²⁰ 1 Ld. Raym. 743.

²¹ *Bussard v. Levering*, 6 Wheat. 102, 5 L. Ed. 215; *Kuntz v. Temple*, 48 Mo. 71; *Barrett v. Allen*, 10 Ohio, 426; *Reed v. Wilson*, 41 N. J. Law, 29. "When days of grace are allowed on a bill or note, and the third day falls on Sunday, the bill or note is payable on the previous Saturday." Per Bronson, J., in *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530.

²² *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. Ed. 37; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Brown v. Harraden*, 4 Term R. 148; *Cook v. Darling*, 2 R. I. 385; *Beck v. Thompson*, 4 Har. & J. (Md.) 531.

²³ *Oridge v. Sherborne*, 11 Mees. & W. 374.

ment.⁸³ But now, in most jurisdictions, days of grace have been abolished.⁸⁴

With respect to the time of presentment, it is still necessary to consider the hour of the day at which presentment, to be sufficient, must be made. The hour of presentment, on the proper day, is immaterial, where the presentment is to the maker, drawee, or acceptor, or his agent for the purpose of making or refusing acceptance or payment, provided that no objection was expressly or impliedly made to the hour of presentment by the person to whom presentment is made.⁸⁵ But if a presentment other than to such a person is relied upon, or if the refusal was expressly or impliedly placed upon the ground that the hour of presentment was unreasonable, it is necessary for the holder to show that he presented the instrument at a reasonable time of day.⁸⁶ What is a reasonable time of day for presentment depends upon the practice of merchants.⁸⁷ In ordinary cases, where the reasonableness of the hour is material, the following rules are applicable: (1) Presentment at a bank should be during banking hours,⁸⁸ but if

⁸³ Avery v. Stewart, 2 Conn. 69, 7 Am. Dec. 240; Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Colms v. Bank of Tennessee, 4 Baxt. (Tenn.) 422; Sands v. Lyon, 18 Conn. 18.

⁸⁴ N. I. L. § 85. For modification in several states and comments, see Brannan, Anno. N. I. L. (2d Ed.) 98-100.

⁸⁵ Farnsworth v. Allen, 4 Gray (Mass.) 453; King v. Crowell, Johns. Cas. Bills & N. 91, semble. But see N. I. L. §§ 72 (subd. 2), 75. Section 145, N. I. L., provides: "Presentment for acceptance must be made * * * at a reasonable hour on a business day."

⁸⁶ Vaughan v. Potter, 131 Ill. App. 334. In the case of DANA v. SAWYER, 22 Me. 244, 39 Am. Dec. 574, Moore Cases Bills and Notes, 243, it was held that presentment at nearly midnight to the maker, after the latter had retired, would not be sufficient, unless there was a waiver, or unless it was shown that payment would not have been made on a demand at a proper hour.

⁸⁷ A customary hour for presentment at the place where presentment is made is a reasonable hour within the practice of merchants, although such custom at that place may be different from that at other places. COLUMBIAN BANKING CO. v. BOWEN, 134 Wis. 218, 114 N. W. 451 (N. I. L.), Moore Cases Bills and Notes, 235; Knickerbocker Trust Co. v. Miller, 156 App. Div. 810, 142 N. Y. Supp. 440 (N. I. L.).

⁸⁸ Elford v. Teed, 1 Maule & S. 28; Parker v. Gordon, 7 East, 385; Staples v. President, etc., of Franklin Bank, 1 Metc. (Mass.) 43, 35

made after banking hours, to the proper authorities in the bank, it is sufficient, if, on that day, no funds were there provided for payment.³⁹ (2) Presentment at a place of business should be made during the usual business hours.⁴⁰ (3) Presentment at one's residence should be made between the usual hours of rising and retiring.⁴¹

Am. Dec. 345; *Thorpe v. Peck*, 28 Vt. 127. See *Metropolitan Bank v. Engel*, 68 App. Div. 273, 72 N. Y. Supp. 691 (N. I. L.). It is unnecessary that the instrument be left at the bank where payable during the entire banking day. *Archuleta v. Johnston*, 53 Colo. 393, 127 Pac. 134 (N. I. L.). Where payment is demanded and refused at the bank where the instrument is payable, it will be presumed, until the contrary is shown, that the demand was made during banking hours. *Archuleta v. Johnston*, *supra*.

³⁹ In the case of *Salt Springs Nat. Bank of Syracuse v. Burton*, 58 N. Y. 432, 17 Am. Rep. 265, it was shown that, upon the day the note was due, the indorser, being prepared to pay it, sent the maker to the bank during banking hours to ascertain the amount. The note was presented for payment, an hour after the close of banking hours, by the holder, to the cashier, and payment demanded. This was refused on the ground that there were no funds deposited for the purpose. It was held that the indorser was charged by such demand. And see *Bank of Syracuse v. Hollister*, 17 N. Y. 46, 72 Am. Dec. 418; *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230; *Flint v. Rogers*, 15 Me. 67; *Crook v. Jadis*, 6 Car. & P. 191; *Commercial & R. Bank of Vicksburg v. Hamer*, 7 How. (Miss.) 448, 40 Am. Dec. 80; *Cohea v. Hunt*, 2 Smedes & M. 227; *Shepherd v. Chamberlain*, 8 Gray (Mass.) 225, 69 Am. Dec. 248; *Bank of Utica v. Phillips*, 3 Wend. (N. Y.) 408; *Henry v. Lee*, 2 Chit. 124; *Garnett v. Woodcock*, 6 Maule & S. 44. In the case last cited it was held that a presentment of a bill of exchange at the banking house where payable, after banking hours, is sufficient if a person be stationed at the banking house, and return answer of "No orders." Section 75, N. I. L., seems, therefore, to be declaratory.

⁴⁰ *Lunt v. Adams*, 17 Me. 230; *Wallace v. Crilley*, 46 Wis. 577, 1 N. W. 301; *Triggs v. Newnham*, 1 Car. & P. 631; *Strong v. King*, 35 Ill. 9, 85 Am. Dec. 336, Johns. Cas. Bills & N. 93.

⁴¹ *Salt Springs Nat. Bank of Syracuse v. Burton*, 58 N. Y. 430; *Nelson v. Fetterall*, 7 Leigh (Va.) 179; *Skelton v. Dustin*, 92 Ill. 49. In the case of *Barclay v. Bailey*, 2 Camp. 527, it was held that the presentment of a bill of exchange for payment at the house of a merchant at 8 o'clock in the evening of the day it became due was sufficient to charge the drawer. *DANA v. SAWYER*, 22 Me. 244, 39 Am. Dec. 574, Moore Cases Bills and Notes, 243.

PROTEST

145. Where the instrument dishonored is a foreign bill, it must be protested (unless protest is excused or dispensed with) in order that the holder may recover from the drawer or indorser. By the law merchant the protest (unless excused or dispensed with) is in general, the only admissible evidence of the facts essential to the dishonor of a foreign bill. By statute, in most of the states, the protest of an inland bill or promissory note is admissible, although not necessary, evidence of the facts essential to dishonor and notice of dishonor.

By "protest" is meant the formal instrument,⁴² executed by a notary or other competent person, certifying that the

⁴² A protest has been defined as "the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the non-acceptance or even non-payment, as the case may be, of the bill in question; and a calling of a notary to witness that due steps have been taken to present it." Daniel, Neg. Inst. (5th Ed.) § 929. In so far as this definition suggests that a statement by the holder before a notary would be a protest, it seems to be inaccurate. There may be some ground in the language used by the earlier authorities for saying that the protest is the dishonor in the presence of a notary or other person competent to make out the certificate of protest. Holt, C. J., in Buller v. Crips, 6 Mod. 29; Buller, N. P. 270. But a careful examination of the language of the earliest as well as of the modern decisions seems to show that "protest" means the certificate of protest, and "protested" describes the drawing up of the certificate. See Vanderwall v. Tyrrell, 1 Moody & M. 87; Orr v. Maginnis, 7 East, 359; Ocoee Bank v. Hughes, 2 Cold. (Tenn.) 52; Byles, Bills, *263; Randolph, Com. Pap. § 1137. These are the senses in which these words are used in the N. I. L. See N. I. L. §§ 152-160. The term "protest" is also used popularly to designate the taking of all the steps essential to a fulfillment of the conditions of the obligation of a drawer or indorser. Townsend's Adm'r v. Lorain Bank of Elyria, 2 Ohio St. 345; Wolford v. Andrews, 29 Minn. 251, 13 N. W. 167, 43 Am. Rep. 201. Thus the words "protest and notice of protest waived" have been held to express a waiver of presentment and notice of dishonor. This conclusion was reached independently of section 111, N. I. L. which was treated as declaring the pre-existing law. Bank of Montpelier v. Montpelier

facts necessary to the dishonor of the instrument by non-acceptance or non-payment⁴³ have taken place. By the law merchant, as applied in the courts of the United States, this certificate is, in an action by the holder against the drawer or indorser of a foreign bill,⁴⁴ evidence⁴⁵ of dishonor.⁴⁶ This rule of evidence, since it makes it easier for

Lumber Co., 16 Idaho, 730, 102 Pac. 685 (N. I. L.). But see McBride v. Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. Supp. 1041; Sherman v. Ecker (City Ct.) 109 N. Y. Supp. 678 (N. I. L.). See, also, Bigelow, Bills, Notes & Cheques (2d Ed.) 176, 177.

⁴³ As to protest for better security, see Byles, Bills, *258; section 158, N. I. L. As to acceptance supra protest, see §§ 72, 73, supra. As to payment supra protest, see § 118, supra.

⁴⁴ For a definition of a foreign bill, see p. 31, supra.

⁴⁵ This rule involves a departure from the general principle requiring the production of the best evidence. Ashe v. Beasley, 6 N. D. 191, 69 N. W. 188. Accordingly the common-law courts have been unwilling to extend its application. Thus in Chesmer v. Noyes, 4 Camp. 129, Lord Ellenborough refused to admit a notarial certificate as evidence of a presentment in England of a foreign bill. Accord: Townsley v. Sumrall, 2 Pet. 170, 179, 180, 7 L. Ed. 386; 1 Parsons, Notes & Bills, 635; Byles, Bills, *261; Chitty & Hulme, Bills (18th Am. Ed.) *455, *655. See, also, Bank of State of South Carolina v. Green, 2 Bailey (S. C.) 230, and comment by Johnson, J., in Cape Fear Bank v. Stinemetz, 1 Hill (S. C.) 44. Contra: Ashe v. Beasley, supra, semble; Daniels, Neg. Inst. (5th Ed.) § 968.

⁴⁶ It has been held that the protest, where the necessary facts are therein stated, is also evidence of notice of dishonor. Cape Fear Bank v. Stinemetz, 1 Hill (S. C.) 44; Halliday v. McDougall, 20 Wend. (N. Y.) 81, semble; 2 Parsons, Notes and Bills, 498. But the opposite conclusion is established by the great weight of authority. Randolph, Com. Pap. § 1181; Daniel, Neg. Inst. (5th Ed.) § 960; Bank of Rochester v. Gray, 2 Hill (N. Y.) 227. By statute, however, in most jurisdictions, the notarial certificate is made *prima facie* evidence of the facts as to notice stated therein. Byles, Bills (Sharswood's Ed.) *261, note 1; Randolph, Com. Pap. § 1181; Daniel, Neg. Inst. (5th Ed.) § 960. These statutory provisions are usually contained in sections relating to the powers and duties of notaries, and thus apply only to certificates executed by notaries within the respective states. First Nat. Bank of Brandon v. Briggs' Estate, 70 Vt. 599, 41 Atl. 586; Bank of Rochester v. Gray, supra; section 176, St. Wis. 1898. But such provisions, although they usually do not enlarge the official duties of the notary, so as to make him liable for his failure to give due notice (State ex rel. Workingmen's Banking Co. v. Edmunds, 66 Mo. App. 47), nevertheless sanction the official certification of additional facts and thus add to the official functions of the notary. The rea-

the holder of a foreign bill to prove his case against the drawer, increases the commercial utility of this form of obligation. But it is desirable, from the point of view of merchants dealing in foreign bills, not only that this certificate be recognized, for the convenience of the holder, as evi-

son usually given for the distinction, under the law merchant, between the statements in the notarial certificate as to dishonor and those as to notice, is that the giving of the notice forms no part of the official functions of the notary. *Schofield v. Palmer* (C. C.) 134 Fed. 753; *Daniel, Neg. Inst.* (5th Ed.) § 980. But see *First Nat. Bank of Brandon v. Briggs' Estate*, *supra*. If this is the true reason, it seems that, where the notarial certificate is executed in a state which recognizes it as evidence of due notice, the courts of another state, in an action against the drawer or indorser of a foreign bill, should receive that certificate as evidence of notice of dishonor, on the ground that the statement therein of the facts of dishonor is an official act of the notary, and following the reasoning of those cases which hold that the protest of a note indorsed in one jurisdiction and payable in another is admissible, although not necessary, evidence of the facts of dishonor. See note 47, *infra*. This conclusion was reached in *Persons v. Kruger*, 45 App. Div. 187, 60 N. Y. Supp. 1071, where, however, the court placed some reliance upon a similar statute of the forum. With respect to inland bills and promissory notes, however, the reasons for refusing to admit the protest as evidence are different. See note 47, *infra*. Accordingly, with respect to such instruments, it may well be doubted whether any court can, by reason of such legislation, properly admit as evidence a notarial certificate, executed in a foreign jurisdiction where there is similar legislation, as evidence of any of the facts of dishonor or notice of dishonor. Such a certificate was rejected in *Vaughan v. Potter*, 131 Ill. App. 334, 342. Referring to the Illinois statute of 1828, the court there said that it, "in making a statutory rule of evidence for the courts of Illinois about the records of officers of Illinois, viz., 'notaries public in this state,' did not make the records or certificates of notaries public out of this state, and not its officers, evidence in this state in cases where before they were not so." Accord: *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673, *semble*. It has been held, however, even in the case of a promissory note, that the certificate will be admitted, if admissible under the law of the state where the note is payable, even though a similar certificate would not be admissible, if executed in the forum, by the law of the forum. *Carruth v. Walker*, 8 Wis. 252, 76 Am. Dec. 235. And in *Second Nat. Bank v. Smith*, 118 Wis. 18, 94 N. W. 684, it was held that the certificate of an Indiana notary of the dishonor of a note made, indorsed, and payable in that state, is admissible in a suit thereon, against the indorser, in Wisconsin.

dence of dishonor, but also that the drawer be confronted by evidence of the truth of which he may feel reasonably certain, without going to the expense and inconvenience of making, at the foreign place of dishonor, his own investigation of the facts. Accordingly it is settled that, in an action based upon the conditional liability of the drawer or indorser of a foreign bill,⁴⁷ a protest is the only evidence

⁴⁷ By section 152, N. I. L., it is provided that, "where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." By the law merchant, as applied in the continental courts, it is necessary that the holder of any note or bill, inland or foreign, procure a protest as written evidence of dishonor. Thomson, Bills (Wilson's Ed.) 306. It has been suggested that the rule as stated in the text is the result of applying in England the continental law as to the necessity of protest with respect to bills payable on the continent. Byles, Bills (Sharswood's Ed.) *256, and note. But this reason would apply equally to notes indorsed in one jurisdiction, but payable in another. In the United States it has been held in one jurisdiction that a note executed in one state and payable in another is a foreign bill within the meaning of the rule as stated in the text. Cape Fear Bank v. Stinemetz, 1 Hill (S. C.) 44; Brown v. Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779, semble. But this view is opposed by the weight of authority. Kirtland v. Wanzer, 2 Duer (N. Y.) 278; Smith v. Little, 10 N. H. 526, 531; Williams v. Putnam, 14 N. H. 540, 40 Am. Dec. 204, semble. It has also been said that, where the note is payable in one jurisdiction and indorsed in another, such indorsement is a foreign bill within the meaning of this rule. Piner v. Clary, 17 B. Mon. (Ky.) 646, semble. But the protection of a holder who acquires the instrument without notice of the place of indorsement seems to require the contrary conclusion, which is sustained by the weight of authority. Kirtland v. Wanzer, supra; Smith v. Little, supra; Williams v. Putnam, supra, semble. See Bonar v. Mitchell, 5 Exch. 415. It seems that the real reason for the refusal of the courts of England and the United States to require a protest and even to admit a protest as evidence of dishonor, in the case of an inland bill or note, is that commercial convenience did not require the recognition of such a protest so urgently as in the case of foreign bills, since inland bills and promissory notes were usually dishonored in the jurisdiction in which the action was brought. See note 45, supra. On the assumption that such is the only reason for refusing to admit the protest as evidence of dishonor in the case of a promissory note, it has been held that, where the note is payable in one jurisdiction and indorsed in another, the protest will be admitted, although not required, as evidence of dishonor occurring in a jurisdiction other than that in which the action is brought. Ticonic Bank v. Stackpole, 41 Me. 302; Carter v. Burley, 9

which will be received as tending to prove the dishonor.⁴⁸ The protest is not conclusive, but the inference of dis-

N. H. 558, *semble*; *Williams v. Putnam*, 14 N. H. 540, 40 Am. Dec. 204, *semble*. Contra: *Kirtland v. Wanzer*, 2 Duer (N. Y.) 278. See, also, *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Vaughan v. Potter*, 131 Ill. App. 334. So in *Cape Fear Bank v. Stinemetz*, 1 Hill (S. C.) 44, the court, by Johnson, J., says: "Supposing this note to belong to the class falling within the rules applicable to inland bills, yet the protest was made without the jurisdiction of this court. It is admitted in evidence in cases of foreign bills, in some degree from necessity and the encouragement of commerce, and clearly all the circumstances of convenience and necessity exist to render it admissible in the supposed case as are found in the case of foreign bills, and ought, I think, to be admitted." See note 68, *infra*.

⁴⁸ None of the essentials of dishonor, in the case of a foreign bill, can, in general, be proved by evidence other than the protest. *Randolph*, Com. Paper, § 1169. Contra: *Stainback v. Bank of Virginia*, 11 Grat. (Va.) 280, *semble*. In *Daniel*, Neg. Inst. (5th Ed.) § 969, it is said: "Parol evidence is admissible to supply the omission, provided it is in furtherance of, and not consistent with or contrary to, the statements that are made in the protest." None of the cases cited, however, sustains this conclusion. It is frequently said that a protest is necessary to the performance of the conditions of the obligation of the drawer or indorser of a foreign bill. *Daniel*, Neg. Inst. (5th Ed.) § 926; 2 Ames Cases Bills and Notes, 114, 863; *Ocean Nat. Bank v. Williams*, 102 Mass. 141. If this were true, it would be necessary to allege in a complaint by the holder against the drawer or indorser that the instrument had been protested. But in *Salomons v. Staveley*, 3 Doug. 298, it was held that a declaration by the holder against the drawer of a foreign bill, which did not allege a protest, was not bad on general demurrer. See *Hart v. Otis*, 41 Ill. App. 431. Contra: *Chaters v. Bell*, 4 Esp. 47, *semble*, where, however, Lord Kenyon said: "The want of actual protest afforded no justifiable ground in law for the indorser to refuse payment of the bill." The dictum in *Chaters v. Bell*, *supra*, was based upon *Gale v. Walsh*, 5 Term R. 239, where the plaintiff was non-suited because he did not *prove* a protest for non-acceptance. See, also, *Buller*, N. P. 278. Compare *Armani v. Castrique*, 13 M. & W. 443; *Jordan v. Bell*, 8 Port. (Ala.) 53. It would also be necessary to offer in evidence, at the trial, a protest completed before the commencement of the action. But according to authority and practice a certificate completed after action begun should be admitted. In *Goostrey v. Mead*, *Buller*, N. P. 271, it was said that only the noting need be made on the day of dishonor, but that the protest might be extended at any time thereafter. In *Orr v. Maginnis*, 7 East, 359, Lord Ellenborough abandoned the absence of protest for non-acceptance before action brought as a ground for non-suit, upon *Goostrey v. Mead*, *supra*, being cited to

honor to be drawn from it may be rebutted by other evidence.⁴⁹

Because of his official character, only the certificate of a notary will satisfy this requirement, unless it appears

him. In *Chaters v. Bell*, *supra*, Lord Kenyon was of the opinion that protest might be made at any future time, if the bill were regularly noted at the time of demand and refusal of payment. In *Geralopulo v. Wieler*, 10 C. B. 390, where the action was by the payor *supra* protest for the honor of the second indorser against the acceptor, it was held that a protest executed after the commencement of the action was admissible, and showed protest so far as it was essential to the cause of action, there having been a noting of the facts of dishonor and of the declaration of payment for honor on the days when those acts took place. The court places its decision upon the ground that a protest executed after the commencement of an action is sufficient. *Id.* 712. The opinion also states that such was the general understanding among notaries in practice. *Id.* 706. To the same effect is 1 Parsons, Notes and Bills, 644, note "k," citing Brooke's Notary, 97. In *Dennistoun v. Stewart*, 17 How. 606, 15 L. Ed. 228, it was said by Grier, J.: "A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before trial, and consequently may be amended according to the truth, if any mistake has been made." Bigelow, Bills, Notes & Cheques (2d Ed.) 131, note, expresses the opinion that the certificate of protest may be amended so as to prove the required facts at any time before its introduction as evidence. In *Commercial Bank of Kentucky v. Barksdale*, 36 Mo. 563, a certificate of protest, made out after the action was begun, by the notary who presented the foreign bill in suit for payment, was offered as evidence. It was held that this protest was not evidence of dishonor, because the notary had not noted the bill at the time of dishonor. No objection to this evidence was made on the ground that the protest was made out after the commencement of the action. See, also, Daniel, Neg. Inst. (5th Ed.) § 940, note 57. It would also, it seems, be necessary to give to the indorser notice of the execution of the certificate. But this is held to be unnecessary. *Chaters v. Bell*, *supra*; *Robins v. Gibson*, 1 M. & Selw. 288; *Ex parte Lowenthal*, L. R. 9 Ch. 591, 593; N. I. L. § 96. See, however, Bayley, Bills (2d Am. Ed.) 256, note 85. These conclusions indicate that the protest, i. e., the notarial certificate, or reasonable diligence to obtain it, is not a condition precedent to a right of recourse against the holder. The correctness of this conclusion is suggested by the manner of statement of the continental rule in Thomson, Bills (Wilson's Ed.) 306. See, also, *Id.* 309; *Byles, Bills*, *256; 1 Parsons, Notes and Bills, 642. Sections 152, 155, N. I. L. seem entirely consistent

⁴⁹ Daniel, Neg. Inst. (5th Ed.) § 959, and cases cited.

that no notary could, by the exercise of reasonable diligence, be obtained.⁵⁰ In such case the certificate of any respectable private resident of the place where the bill is dishonored, executed in the presence of two or more credible witnesses, is a protest.⁵¹ It is not necessary that the protest be under the seal of the notary. His signature is sufficient.⁵² The seal, however, is recognized as evidence of the authority of the person executing the protest. Without the seal it is necessary to introduce other evidence

with this view. It is held, however, that protest may be waived by the drawer or indorser. Chitty, Bills, *188. See *Patterson v. Beher*, 6 Moore, 319; *Gibbon v. Coggan*, 2 Camp. 188. N. I. L. § 159, provides: "Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence." N. I. L. § 111, provides: "A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor." A conception of the implied obligation of the drawer or indorser of a foreign bill, which is consistent with the above conclusions, drawn from the cases and the Negotiable Instruments Law, is that it is a condition precedent to recourse against such drawer or indorser that the instrument be dishonored under such circumstances that a protest can later be drawn up, or that reasonable diligence be used to have the dishonor take place under such circumstances. In other words, due diligence to have the dishonor take place in the presence of a notary or other person competent to make out the certificate of protest is essential to a right of recourse against the drawer or indorser of a foreign bill. The word "protest" has sometimes been used to express dishonor under such circumstances. See note 42, supra. See, also, *Salomons v. Stavely*, 8 Doug. 298.

⁵⁰ *Byles, Bills*, *257; *Randolph, Com. Pap.* § 1139; *Daniel, Neg. Inst.* (5th Ed.) §§ 934, 934a; *Burke v. McKay*, 2 How. 66, 11 L. Ed. 181, *semble*; *Read v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 91, 15 Am. Dec. 86. See N. I. L. § 154.

⁵¹ It has been said that the presence of witnesses is not essential. *Daniel, Neg. Inst.* § 934a. Under the N. I. L. the presence of two or more credible witnesses is essential to the protest, when executed by a private party. N. I. L. § 154.

⁵² *Huffaker v. National Bank of Monticello*, 75 Ky. (12 Bush) 287. But see N. I. L. § 153.

tending to prove such authority.⁵³ Nor is it necessary that the notary sign the protest by his own hand. It is sufficient if his signature is affixed by his authority.⁵⁴ It is usually said that the protest must be executed by the same person who presented the instrument for acceptance or payment. This is the usual practice, but it is not clear that it is essential.⁵⁵ The person executing the protest should be a competent witness, in the court in which the action is brought, to the facts sought to be proved by it. According-

⁵³ London & River Plate Bank v. Carr, 54 Misc. Rep. 94, 105 N. Y. Supp. 679 (bills payable in Brazil; N. I. L. not referred to).

⁵⁴ Fulton v. MacCracken, 18 Md. 528, 81 Am. Dec. 620.

⁵⁵ The rule is generally stated that the presentment and noting of the bill and the drawing up of the protest must be the acts of one and the same notary. 2 Ames on Bills & Notes, 450, note 1; Id. 863; Daniel, Neg. Inst. § 934. The case cited in support of this doctrine is Commercial Bank of Kentucky v. Barksdale, 36 Mo. 563, where it was held that a certificate of protest of a foreign bill executed by a notary, in New York, who was the principal of the one who actually presented the bill, was not evidence of any compliance with the conditions of the drawer's obligation. The ground of decision in that case, however, was that "in court the instrument speaks as a witness. Such statement, made merely upon the information of another person, would amount to hearsay only, if the notary were himself upon the stand as a witness." This reason indicates that the general rule as stated above should be modified, so as to deprive the certificate of evidentiary value only where the notary, or other qualified person, certifies to facts not within his own personal knowledge. The opinion of the court in the case cited also suggests a further limitation, namely, that where, by statutory law or commercial practice at the place of dishonor, it is permissible for the notary to certify to the facts known to his agent for presentment, demand, and noting, a certificate made in accordance with such law or custom will, in other states, be treated as the usual certificate of protest, and it has been so held. Carter v. Union Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89 (statute); Kock v. Bringler, 19 La. Ann. 183 (statute); Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269 (usage). It seems that in England the certificate of protest is admissible, although the only presentment was by the notary's clerk. See note 1 Parsons, Notes & Bills, 641. Contra: Leftley v. Mills, 4 Term R. 170, *semble*. See 2 Ames Cas. Bills & Notes, 352, note. See N. I. L. § 154, and B. E. A. § 94. These sections refer to the certificate of protest, and their position under the general heading "Protest" suggests that there is no requirement that the presentment of a foreign bill be by a notary or other person qualified to act as a notary.

ly the protest has been rejected where executed by a party who, by reason of an interest in the result of the suit, would not be permitted to testify in person.⁵⁶

From the rule permitting the introduction of the protest as evidence of dishonor, it follows that the protest must clearly describe the instrument to which it refers. It is therefore usual, but not necessary, to include a copy of the bill in the protest.⁵⁷ It also follows that the protest should state facts which are fresh in the mind of the person executing it. Accordingly it is settled that such person must, on the day of dishonor,⁵⁸ either complete the protest or make some note or memorandum of the facts, which must be recited in the protest. From such a noting, the protest may, it seems, be "extended" at any time before it is necessary to introduce it as evidence in the course of trial.⁵⁹ The noting usually consists of writing upon the bill the day, month, and year of dishonor and the charges of protest, followed by the signature or initials of the person who later makes out the protest.⁶⁰ It is not, however, necessary that the noting be upon the bill. It may be made in the official record book of the notary, or upon any paper

⁵⁶ Herkimer County Bank v. Cox, 21 Wend. (N. Y.) 119, 34 Am. Dec. 220; Monongahela Bank v. Porter, 2 Watts (Pa.) 141; Thomson, Bills (Wilson's Ed.) 309. Compare Patton v. Bank of Lafayette, 124 Ga. 905, 53 S. E. 664, 5 L. R. A. (N. S.) 592, 4 Ann. Cas. 639; Moreland's Assignee v. Citizens' Sav. Bank, 97 Ky. 211, 30 S. W. 637.

⁵⁷ In Lionberger v. Mayer, 12 Mo. App. 575, mem., it was held that a protest, otherwise competent, should not be rejected because the bill is not copied therein, where it is attached thereto and fully identified. See, also, Dennistoun v. Stewart, 17 How. 606, 15 L. Ed. 228. Section 158, N. I. L., seems to be declaratory.

⁵⁸ Byles, Bills, *257; Daniel, Neg. Inst. (5th Ed.) § 939; N. I. L. § 155. On the continent it is not usually required that the noting of the instrument take place upon the day of dishonor. Randolph, Com. Pap., § 1159; Benjamin, Chalmers, Dig. Bills, art. 178, note. See N. I. L. §§ 159, 160.

⁵⁹ See note 48, supra.

⁶⁰ Byles, Bills, *258-259. Thus the indorsement on a bill of exchange, by a notary protesting it, of the words "Protested for non-payment," and, in addition, the day of the month and the year, to which is affixed his official signature, is a sufficient noting of protest. Moreland's Adm'r v. Citizens' Nat. Bank, 114 Ky. 577, 71 S. W. 520, 61 L. R. A. 900, 102 Am. St. Rep. 293.

annexed to the bill. It has been held that where, on the day of the dishonor of a foreign bill, the notary makes a memorandum of the essential facts of dishonor upon a separate piece of paper, but later, upon making out the protest, destroys the memorandum, the protest is admissible.⁶¹

Since the protest is the only evidence which will be received, it must state all the facts essential to dishonor. It must, therefore, expressly or impliedly state the time of presentment and demand and the person from whom acceptance or payment was demanded, or set forth the circumstances dispensing with such presentment and demand, the place of presentment and demand, when material, and the non-acceptance or non-payment.⁶² It is usual, but not necessary, to state the reasons given for the refusal to accept or pay.⁶³ It is not necessary that all these facts be expressly stated. To recite every detail would be very inconvenient, for it would be necessary to draw up the protests with the greatest care. A statement of some matters of detail will be implied from the express statement of others. Thus, where a notary's protest declares that he presented the note for payment at a bank named, on a day named, and found the bank closed, it inferentially states that it was presented during regular banking hours.⁶⁴ But

⁶¹ Moreland's Adm'r v. Citizens' Nat. Bank, 114 Ky. 577, 71 S. W. 520, 61 L. R. A. 900, 102 Am. St. Rep. 293. The existence of the memorandum was here established by the parol testimony of the notary who executed the protest. So in Mattingly v. Bank of Commerce (Ky.) 53 S. W. 1043, where it appeared from other evidence that the notary had, on the day of dishonor, sent out notices of dishonor, but had merely marked "Protested" on the bill, it was held that, since the notices must have recited the facts of dishonor, no other noting was necessary.

⁶² Randolph, Com. Pap. §§ 1162-1165; Daniel, Neg. Inst. (5th Ed.) §§ 950-958. But see N. I. L. § 153, which seems to impose additional requirements.

⁶³ Randolph, Com. Pap. § 1165; Daniel, Neg. Inst. (5th Ed.) § 957. But see N. I. L. § 153. The recital in the protest of the reasons given by the drawee for non-acceptance, viz., that he had no effects of the drawer, is not evidence of the absence of such effects. Dumont v. Pope, 7 Blackf. (Ind.) 367.

⁶⁴ Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383 (N. I. L.). So, where a note is payable at a bank, a statement in the

where the protest merely certifies that the notary "this day protested for non-payment the annexed note," it is not sufficient evidence of dishonor.⁶⁶

It seems that the protest of a foreign bill should be made where the dishonor occurs. This appears to have been the general practice.⁶⁶ Where, however, the bill is drawn upon drawees resident in one place, but is payable at another place, it may, after non-acceptance or non-payment, be protested in either place.⁶⁷

By the law merchant, excluding statutory and recently established customary changes therein, the certificate of a

protest that the note was presented at the place of payment and payment demanded is sufficient evidence of a legal demand, without a further statement of to whom it was presented for payment. *Ashe v. Beaseley*, 6 N. D. 191, 69 N. W. 188. And where the protest of a foreign bill stated that the notary exhibited the bill to a clerk of the drawee at the latter's countinghouse, it was held to contain an implied statement that such clerk was authorized to refuse acceptance. *Stainback v. Bank of Virginia*, 11 Grat. (Va.) 280. See, also, *Lathrop v. Delee*, 8 La. Ann. 170, and *Kupferberg v. Horowitz*, 52 Misc. Rep. 488, 102 N. Y. Supp. 502. As indicated by these cases, the doctrine of implied statement is not confined to foreign bills. It applies also to the certification of the essentials of due notice, under the provisions of statutes making the notarial certificate evidence of such essentials when stated. *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51; *Ticonic Bank v. Stackpole*, 41 Me. 321, 66 Am. Dec. 246. Compare *Farmers' Nat. Bank of West Chester, Pa., v. Marshall*, 9 Pa. Super. Ct. 621; *Mason v. Kilcourse*, 71 N. J. Law, 472, 59 Atl. 21.

⁶⁶ *Union Nat. Bank of Troy v. Williams Milling Co.*, 117 Mich. 535, 76 N. W. 1. So where the note was payable at a particular bank, and the protest recited that it was presented for payment to the cashier of that bank, it was held that the protest was not sufficient evidence of the presentment of the note at the place of payment. *Magoun v. Walker*, 49 Me. 420; *Seneca County Bank v. Neass*, 5 Denio (N. Y.) 329.

⁶⁷ *Byles, Bills*, *257, *258; *Chitty & Hulme, Bills*, *458; *N. I. L.* § 156.

⁶⁸ *Chitty & Hulme, Bills*, *458; *Daniel, Neg. Inst.* (5th Ed.) § 935. Under the *N. I. L.* it is necessary, where the bill is drawn payable at a place of business or residence of some person other than the drawee and has been dishonored by non-acceptance, to protest it for non-payment at the place where it is expressed to be payable. *N. I. L.* § 156.

notary that the facts necessary to the dishonor of an inland bill or promissory note have taken place is not admissible as evidence of such facts.⁶⁸ But now with reference to inland bills (including checks and promissory notes) it is generally provided by statute that the certificates of notaries are not only evidence of facts, stated therein, which are necessary to dishonor, but also of facts, stated therein, which are essential to notice of dishonor.⁶⁹

⁶⁸ *Montellus v. Charles*, 76 Ill. 303, 310. The practice of having inland bills and promissory notes protested became so general that the law merchant might well have been thus modified without the aid of statute. This general practice was emphasized as a ground for decision in *Turner v. Rogers*, 8 Ind. 139, where it was held that a notarial certificate was evidence of the dishonor of a promissory note, under a statute giving notaries power to do all acts which they could do according to the law merchant and the common law, and providing for a fee for each notice of protest given. See, also, *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Bank of Cape Fear v. Stinemetz*, 1 Hill (S. C.) 44.

⁶⁹ *German Nat. Bank of Beatrice v. Beatrice Nat. Bank*, 63 Neb. 246, 88 N. W. 480. See *Montellus v. Charles*, 76 Ill. 303. See, also, note 46, supra. These statutes usually do not place the same restrictions upon the use, as evidence, of notarial certificates as were, by the law merchant, placed upon such use of protests in actions upon foreign bills. Thus, since these certificates are not the only legal evidence of dishonor, parol proof may be introduced to supplement an incomplete certificate. *Seneca County Bank v. Neass*, 5 Denio (N. Y.) 329; *Cook v. Merchants' Nat. Bank of Vicksburg*, 72 Miss. 982, 18 South. 481; *Nailor v. Bowie*, 3 Md. 252; *Sasscer v. President, etc., of Farmers' Bank of Maryland*, 4 Md. 409. It seems that it is not always necessary to make a noting at the time of dishonor in order that a certificate executed at future time may be introduced as evidence. *Cayuga County Bank v. Hunt*, 2 Hill (N. Y.) 635; *Union Nat. Bank of Troy v. Williams Milling Co.*, 117 Mich. 535, 76 N. W. 1. And the certificate may be evidence of the fact of notice recited therein, although the certificate was completed before the notices were mailed. *Zollner v. Moffitt*, 226 Pa. 39, 74 Atl. 746. The N. I. L. does not seem to have any effect upon the admissibility of any notarial certificate as evidence. Sections 118, 152-160. See *Feigenspan v. McDonnell*, 201 Mass. 341, 87 N. E. 624 (N. I. L.).

NOTICE OF DISHONOR

146. NOTICE OF DISHONOR—Is bringing, or conforming to a certain standard of diligence in attempting to bring, either verbally or by writing, to the knowledge of the drawer or the indorser of an instrument, the fact that a specified negotiable instrument, upon proper proceedings taken, has not been accepted, or has not been paid, and that the party notified is expected to pay it.

147. Notice must be given as follows:

- (a) By the holder of the instrument, or by any person upon whom a liability is fixed to any person upon whom it is sought to fix a liability.
- (b) Between parties residing in the same place, either by giving it personally, verbally or in writing, or by leaving a written notice at the residence or place of business of the party to be charged; between parties residing in different places, by depositing in the post office, postage paid, a written notice, properly addressed to the person to be charged.
- (c) Within one day after an unqualified refusal to accept the bill or pay the instrument, or by an indorser within one day after he has received notice of his own liability. This means in proper hours of a business day between co-residents, and when served on a non-resident, by or before the last post, if there be one the next day, if not, in the first practicable mail thereafter.

As in the case of presentment, there is a standard fixed by the law merchant to which the notice of dishonor, to be sufficient, must conform. It is convenient to describe this standard by stating (1) what the notice should contain, (2) by whom the notice should be given, (3) to whom the notice should be given, (4) the proper method of giving notice, and (5) the time when the notice should be given.

Content of the Notice

(1) The notice must state *what* instrument has been dishonored.⁷⁰ The object of this requirement is that the party notified may know exactly on what bill or note his liability has become absolute, for he may have drawn or indorsed many bills or notes, of different dates, for different amounts, due at different times, to different persons.⁷¹ The usual practice is to describe the instrument by date, amount, and parties, and state where it is awaiting payment; but any identification which, as a matter of fact, would indicate unmistakably to a business man of ordinary experience in the position of the party sought to be notified what instrument is to be paid, is, irrespective of its actual effect upon such person, sufficient.⁷² In determining whether or not the description of the bill or note is thus sufficient, the circumstances of the case and the indorser's knowledge of these circumstances may, contrary to the rule as to the other contents of the notice, be taken into consideration.⁷³ And even where the notice, under all the

⁷⁰ It would be more accurate to say that, if the instrument in question is not sufficiently described in the notice, the party giving the notice takes the risk of the party sought to be notified being misled as to what instrument was dishonored.

⁷¹ See *Cook v. Litchfield*, 9 N. Y. 279; *Home Ins. Co. v. Green*, 19 N. Y. 519, 75 Am. Dec. 361.

⁷² *Gill v. Palmer*, 29 Conn. 54; *Messenger v. Southey*, 1 Man. & G. 76; *President, etc., of Housatonic Bank v. Laflin*, 5 Cush. (Mass.) 546; *Reynolds v. Appleman*, 41 Md. 615; *Mills v. Bank of United States*, 11 Wheat. 431, 6 L. Ed. 512; *Thompson v. Williams*, 14 Cal. 162; *Tobey v. Lennig*, 14 Pa. 483; *Ross v. Planters' Bank*, 5 Humph. (Tenn.) 335; *Wood v. Watson*, 53 Me. 300; *Snow v. Perkins*, 2 Mich. 238; *McCune v. Belt*, 38 Mo. 291, N. I. L. § 96. Thus a letter written by the holder to the defendant, describing the dishonored note as that of one K. for \$300, indorsed by the defendant and due on the date when notice was sent, but not stating the date of the note, the name of the payee, or for what period it was made in the absence of a showing of special circumstances, sufficiently identifies the instrument in question. *H. Herman Lumber Co. v. Bjurstrom*, 74 Misc. Rep. 93, 131 N. Y. Supp. 689 (N. I. L.).

⁷³ *Daniel, Neg. Inst.* § 976. In an action by the first indorsee of a bill against the drawer, it was proved that the plaintiff wrote a letter to the defendant, stating the bill to be dishonored, and requiring payment; but the letter misdescribed the bill as drawn by

circumstances, is not, in this respect, sufficient, if from the attendant circumstances it is apparent that the indorser was not actually deceived or misled as to the identity of the bill or note, he will be charged.⁷⁴ It thus may become a question of fact whether or not from the contents of the notice itself and the extrinsic facts admitted into the case, knowledge of the dishonor was actually brought home to the indorser.⁷⁵ But this is only where there is doubt whether the indorser understood what particular instrument was dishonored. When there is no dispute as to the facts, the sufficiency of the notice is a question of law for the court.⁷⁶

(2) The notice must state the circumstances essential to a dishonor of the instrument described; that is, it must state the facts necessary to a compliance with the first condition of the drawer's or indorser's obligation.⁷⁷ Accordingly a statement that the instrument is due and unpaid is not sufficient.⁷⁸ But the express statement of the facts necessary to presentment, or the circumstances excusing it, and of non-acceptance or non-payment, is un-

J. H. (the acceptor), and accepted by the defendant. Held, that this was sufficient notice of dishonor. Parke, B., said: "This notice is quite sufficient. It is not possible, under the circumstances, that the defendant could have been misled by it." *Mellersh v. Rippin*, 7 Exch. 578.

⁷⁴ *Carter v. Bradley*, 19 Me. 62, 36 Am. Dec. 735; *Smith v. Whiting*, 12 Mass. 6, 7 Am. Dec. 25; *Moorman v. Bank of Alabama*, 3 Port. (Ala.) 353; *Remer v. Downer*, 23 Wend. (N. Y.) 620; *King v. Hurley*, 85 Me. 525, 27 Atl. 463; section 95, N. I. L. See *Wilson v. Peck*, 66 Misc. Rep. 179, 121 N. Y. Supp. 344, 345 (N. I. L.). See note 70, supra.

⁷⁵ *HODGES v. SHULER*, 22 N. Y. 114, *Moore Cases Bills and Notes*, 53.

⁷⁶ *Cayuga County Bank v. Warden*, 6 N. Y. 19; *Dole v. Gold*, 5 Barb. (N. Y.) 494.

⁷⁷ *Lewis v. Gompertz*, 6 Mees. & W. 402; *Wilkinson v. Adam*, 1 Ves. & B. 468; *Boulton v. Welsh*, 3 Bing. N. C. 688. *Page v. Gilbert*, 60 Me. 488; *Gilbert v. Dennis*, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; *Phillips v. Gould*, 8 Car. & P. 355; *Graham v. Sangston*, 1 Md. 60; *Lockwood v. Crawford*, 18 Conn. 361; *Sinclair's Ex'rs v. Lynah*, 1 Speers (S. C.) 244; N. I. L. § 96.

⁷⁸ *Gilbert v. Dennis*, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; *Mayer v. Boyle* (Sup.) 132 N. Y. Supp. 729 (N. I. L.); N. I. L. § 96.

necessary. These facts may be stated in express terms or by implication.⁷⁹ "I should myself doubt," says Parke, B.,⁸⁰ "whether we could go so far as to say that it ought to appear upon the face of the notice, 'by express terms or necessary implication,' that the bill was presented or dishonored. It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor, and not paid by him." Thus it is sufficient to state that the instrument has been "dishonored,"⁸¹ or "protested,"⁸² because in such a statement it is implied that the steps necessary to

⁷⁹ Rowlands v. Springett, 14 Mees. & W. 7; Shelton v. Braithwaite, 7 Mees. & W. 435; Ex parte Moline, 19 Ves. 216; N. I. L. § 96. It has been said that where the notice is given by an agent it must expressly state that the steps to secure acceptance or payment were taken by authorization from the holder, naming such holder. Hofrichter v. Enyeart, 71 Neb. 771, 99 N. W. 658. But it seems that a statement of such authority is impliedly included in an express statement that the instrument was dishonored. In Harrison v. Ruscoe, 15 Mees. & W. 231, it was shown that a bill of exchange was drawn by H., indorsed by him to B., and by B. to C., in whose hands it was dishonored. C.'s attorney gave notice in due time to A., but stated therein, by mistake, that he was directed by B. (from whom he had no authority) to apply for payment of the bill. It was held that the notice of dishonor was sufficient, notwithstanding this misrepresentation, the only effect of which was to give A. every defense against C. that he would have had if the notice had really been given by B.

⁸⁰ Hedger v. Steavenson, 2 Mees. & W. 799. In this case the following letter from the plaintiff's attorney was held to be a sufficient notice: "Sir: I am desired by Mr. H. to give you notice that a promissory note for £99. 18s., payable to your order 2 months after the date thereof, became due yesterday, and has been returned unpaid; and I have to request you will please remit the amount thereof, with 1s. 6d. noting, free of postage, by return of post. I am, &c., J. S."

⁸¹ Stocken v. Collins, 9 Car. & P. 653; Woodthorpe v. Lawes, 2 Mees. & W. 109; Edmonds v. Cates, 2 Jur. 183; Smith v. Boulton, Hurl. & W. 3.

⁸² Mills v. Bank of United States, 11 Wheat. 431, 6 L. Ed. 512; Cayuga County Bank v. Warden, 1 N. Y. 413; Gruegeon v. Smith, 6 Adol. & E. 499; Everard v. Wilson, 1 El. & Bl. 801; De Wolf v. Murray, 2 Sandf. (N. Y.) 166; Sherman v. Ecker, 59 Misc. Rep. 216, 110 N. Y. Supp. 265 (N. I. L.); Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664 (N. I. L.).

dishonor have been taken. So where, from the language of the notice, it is readily to be inferred that the instrument has been protested, the notice is, in this respect, sufficient; e. g., "Your bill is this day returned with charges," or "with charges or protested exchange." A good illustration of thus impliedly stating the facts necessary to dishonor appears where the paper is payable at a particular place.⁸³ If made payable at a bank or other particular place, it is the business of the maker or acceptor to have funds at that place when the paper becomes due. His failure to do so amounts to a dishonor, and it is sufficient to inform the indorser of this failure. No specific statement of presentment is necessary. A statement to the indorser of non-payment, if it appears that the paper was at the bank at the time of its maturity, is sufficient, because such a statement can mean nothing else than the dishonor of the paper.⁸⁴ But merely giving the drawer or indorser cause for supposing that the instrument has been dishonored is not sufficient.⁸⁵ Accordingly the general view in the United States is that saying or writing merely that the instrument is "due and unpaid," or "that the note remains unpaid," even though coupled with a statement that the person so notified is looked to for payment, is not sufficient, because it does not, to the ordinary merchant, impliedly state anything more than that the instrument is due and unpaid.⁸⁶ It seems that, where the facts as to the content

⁸³ See Bigelow Bills, Notes & Cheques (2d Ed.) 135-142.

⁸⁴ Bayley v. Porter, 14 M. & W. 44; Gilbert v. Dennis, 3 Metc. (Mass.) 496, 38 Am. Dec. 329, semble; Clark v. Eldridge, 13 Metc. (Mass.) 96; Graham v. Sangston, 1 Md. 69.

⁸⁵ REED v. SPEAR, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), Moore Cases Bills and Notes, 250.

⁸⁶ Gilbert v. Dennis, 3 Metc. (Mass.) 498, 38 Am. Dec. 329; PINKHAM v. MACY, 9 Metc. (Mass.) 174, Moore Cases Bills and Notes, 244; Townsend's Adm'r v. Lorain Bank of Elyria, 2 Ohio St. 355; Manning v. Hays, 6 Md. 5; Wynn v. Alden, 4 Denio (N. Y.) 163; Solarte v. Palmer, 1 Bing. N. C. 194; Mayer v. Boyle (Sup.) 132 N. Y. Supp. 729 (N. I. L.). Contra: Paul v. Joel, 3 H. & N. 455, affirmed 4 H. & N. 355 (notice contained demand for attention); Cromer v. Platt, 37 Mich. 132, 26 Am. Rep. 503. See President, etc., of Bank of Cape Fear v. Seawell, 9 N. C. 560.

of the notice are not in dispute, whether or not the notice contains a statement of the essentials of dishonor is a question of mercantile law for the court.⁸⁷

(3) The notice must inform the drawer or indorser that he is looked to for payment of his obligation, on account of the dishonor of the instrument.⁸⁸ The purpose of this element of a sufficient notice is to definitely inform the drawer or indorser that he will be held responsible for the default, and thus warn him of the necessity of taking steps for his own protection. The requirement of this element in the notice prevents knowledge of dishonor from being equivalent to notice of dishonor,⁸⁹ and makes it necessary that the notice be given by the holder, or some party to the instrument liable to the holder, and who is entitled, or, upon taking up the instrument,⁹⁰ will be entitled, to reimbursement from the person sought to be notified. But it is not necessary that the notice expressly state that the drawer or indorser notified is looked to for payment.⁹¹

⁸⁷ Dole v. Gold, 5 Barb. (N. Y.) 490; Townsend's Adm'r v. Lorain Bank of Elyria, 2 Ohio St. 345; Remer v. Downer, 23 Wend. (N. Y.) 628; Brenzer v. Wightman, 7 Watts & S. (Pa.) 286; Bank of Columbia, Use of Bank of United States, v. Lawrence, 1 Pet. 583, 7 L. Ed. 269. But see Paul v. Joel, 8 H. & N. 455, 461.

⁸⁸ Caunt v. Thompson, 7 C. B. 400; Miers v. Brown, 11 Mees. & W. 372.

⁸⁹ Juniata Bank v. Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558; Bank of Old Dominion v. McVeigh, 29 Grat. (Va.) 559; McVeigh v. Bank of Old Dominion, 28 Grat. (Va.) 852; Brown v. Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707; Jagger v. National German-American Bank, 53 Minn. 386, 55 N. W. 545.

⁹⁰ See *infra*, p. 536. Where notice is given by an agent, it is not necessary that he state in the notice on whose behalf he gives it. Woodthorpe v. Lawes, 2 M. & W. 109. In that case a bill of exchange, indorsed in blank, was left by the indorsee at the office of an attorney to be presented. On presentment by the attorney the bill was dishonored. The attorney wrote to the drawer on the following day, describing the bill, and stating that it had been dishonored, and subscribed his name and residence. This was held a sufficient notice of dishonor, though the attorney did not state in whose behalf he applied, nor where the bill was lying. Accord: Maxwell v. Brain, 10 L. T. N. S. 307; N. I. L. § 91. See note 79, *supra*. Contra: Hofrichter v. Enyeart, 71 Neb. 771, 99 N. W. 658, *semble*.

⁹¹ Scarbrough v. City Nat. Bank, 157 Ala. 577, 48 South. 62, 131 Am. St. Rep. 71 (N. I. L. not cited).

Such purpose is sufficiently indicated by the very sending of a notice, otherwise sufficient, where there is nothing about the notice calculated to cause the drawer or indorser to believe that he is not the person intended to be notified.⁹² But if the manner in which the notice is given, under the circumstances of the case, affords to the drawer or indorser reasonable ground for assuming that there was no intention to directly notify him of the fact of dishonor, the notice is not sufficient. Thus, in a recent case, where the notary, acting as the agent of the holder, personally handed to the defendant indorser, but without any verbal comment, an envelope addressed to another indorser and containing a notice of dishonor, purporting to be to such other indorser and including an express statement of expectation of payment from such other indorser, it was held that a sufficient notice of dishonor had not been given to the defendant.⁹³

⁹² Byles, Bills, *276; Cowles v. Harts, 3 Conn. 517; Shrieve v. Duckham, 1 Litt. (Ky.) 194; Warren v. Gilman, 17 Me. 360; Fitchburg Mut. Fire Ins. Co. v. Davis, 121 Mass. 121; Bank of United States v. Carneal, 2 Pet. 543, 7 L. Ed. 513; Furze v. Sharwood, 2 Gale & D. 116, 2 Q. B. 416, 42 E. C. L. 726; Miers v. Brown, 11 Mees. & W. 372; Nelson v. First Nat. Bank, 16 C. C. A. 425, 69 Fed. 798; Solomon v. Pfeister & Vogel Leather Co. (N. J. Err. & App.) 31 Atl. 602. Notice of dishonor in these words: "I hereby give notice that a bill for £50, at 3 months after date, by A. upon and accepted by B., and indorsed by you, lies at" etc., "dishonored"—was held sufficient without further intimation that plaintiff looked to defendant for payment. King v. Bickley, 2 Q. B. 419. N. I. L. § 96; Second Nat. Bank. v. Smith, 118 Wis. 18, 94 N. W. 664 (N. I. L.); Zollner v. Moffitt, 222 Pa. 644, 72 Atl. 285 (N. I. L.), semble.

⁹³ Marshall v. Sonneman, 218 Pa. 65, 64 Atl. 874. But where the envelope was correctly addressed to the defendant indorser, although the inclosed notice purported to be to the maker, the notice was held to be sufficient. The court emphasized the absence of any evidence that the defendant was misled by the error, comparing the situation to that where there is a misdescription of the instrument, but expressed no opinion as to the correctness of Marshall v. Sonneman, supra. Wilson v. Peck, 66 Misc. Rep. 179, 121 N. Y. Supp. 344 (N. I. L.). See Farmers' Nat. Bank v. Howard, 71 W. Va. 57, 76 S. E. 122 (N. I. L.).

By Whom Notice Should be Given

Information of dishonor, imparted to the drawer or indorser by a stranger to the instrument, is not notice of dishonor.⁹⁴ To be sufficient, the notice must be given by the holder or some other party to the instrument, or by his agent for that purpose. An agent of the holder may give notice of dishonor, because, in doing so, he represents and acts on behalf of his principal.⁹⁵ A notary, acting in his official character, is an example of this.⁹⁶ An attorney is also such an agent,⁹⁷ and so a collecting bank is an agent for transmitting notices,⁹⁸ or, more accurately speaking, is a holder and the notary who protests its paper is its agent.⁹⁹ But, as indicated above, it is not necessary that the holder or his agent give the notice.¹ For if only the holder could give notice, then he might secure his own rights against his immediate indorser; but the latter and every other party to the bill would be deprived of all remedy against the prior indorsers and drawer, unless each of these parties should in succession take up the bill immediately on receiving notice.

⁹⁴ *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Sewall v. Russell*, 3 Wend. (N. Y.) 276; *Lawrence v. Miller*, 16 N. Y. 235; *Stanton v. Blossom*, 14 Mass. 116, 7 Am. Dec. 198; *Stewart v. Kennett*, 2 Camp. 177. In this case it was said by Lord Ellenborough that "the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact." *Brailsford v. Williams*, 15 Md. 150, 74 Am. Dec. 559. N. I. L. § 90.

⁹⁵ N. I. L. § 91. Thus where the makers of a note are impliedly authorized by the holder to send notice of dishonor to an indorser, such notice, if otherwise sufficient, charges the indorser. *Traders' Nat. Bank v. Jones*, 104 App. Div. 433, 93 N. Y. Supp. 768 (N. I. L.).

⁹⁶ *Shed v. Brett*, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230; *Renick v. Robbins*, 28 Mo. 339; *Swayze v. Britton*, 17 Kan. 629. See *State ex rel. Working-men's Banking Co. v. Edmunds*, 66 Mo. App. 47.

⁹⁷ *Firth v. Thrush*, 8 Barn. & C. 387.

⁹⁸ *Bank of United States v. Davis*, 2 Hill (N. Y.) 451.

⁹⁹ *Howard v. Ives*, 1 Hill (N. Y.) 263.

¹ *Tindal v. Brown*, 1 Term R. 167; *Chapman v. Keane*, 3 Adol. & El. 193. This case held that an indorsee who has indorsed over, and is not the holder at the time of maturity and dishonor, may give notice at such time to an earlier party, and, upon afterwards taking up the bill and suing such party may avail himself of such notice.

of dishonor—a highly unreasonable position.² Accordingly the notice may be given by any party to the instrument who is liable on it to the holder, and who, upon taking it up, would have a right to reimbursement from the party sought to be notified.³ The liability of the party must be fixed before he is competent to give notice, although he need not know it is fixed when he sends the notices out.⁴ The reason for this rule is that, unless this liability is fixed,

² *West River Bank v. Taylor*, 34 N. Y. 128.

³ *Stanton v. Blossom*, 14 Mass. 116, 7 Am. Dec. 198. This rule excludes the acceptor (*Harrison v. Ruscoe*, 15 Mees. & W. 231) and the maker (*Jagger v. National German-American Bank*, 53 Minn. 386, 55 N. W. 545). There are, however, cases to the contrary, and as matter of authority Mr. Daniel maintains that an acceptor may give notice, whatever the merit of the doctrine. Daniel, *Neg. Inst.* § 990. See *Traders' Nat. Bank v. Jones*, 104 App. Div. 433, 93 N. Y. Supp. 768 (N. I. L.). It is not entirely clear that section 90, N. I. L., is declaratory of the rule as stated. That section provides: "The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who *might* be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given." Commenting upon the combined meaning of sections 68, 89, 90 and 107, N. I. L., the court, in *Williams v. Paintsville Nat. Bank*, 143 Ky. 781, 786, 137 S. W. 535, 537 (Ann. Cas. 1912D, 350), said obiter: "Under the act the holder [may] give notice of dishonor to the indorser to whom it desires to look for the payment of the money, and it is then incumbent upon him within the time specified in the act after he has received the notice from the holder to give notice to those to whom he may wish to look for reimbursement. Antecedent parties, within the meaning of section 107, are those antecedent in liability, and to whom the person giving the notice has a right to look for reimbursement; for by section 90 any party to the instrument may give the notice 'who upon taking it up would have the rights to reimbursement from the party to whom the notice is given.' As to his part of the debt a joint indorser may be looked to for reimbursement by his co-indorser who receives notice of dishonor from the holder. As to his part of the debt he is an antecedent party; for to this extent it is, as between them, his debt. The operation of section 107 is not confined to those who are antecedent in liability as to the whole of the debt; but it applies to all who are antecedent as to any part of it. The indorsers know their relation to each other better than the holder, and the purpose of this act is to provide a uniform rule which the holder may follow in all cases as the rule was applied in the case of successive indorsers at common law."

⁴ *Jennings v. Roberts*, 24 Law J. Q. B. 102.

there can be no inference that the person giving the notice looks to the party to whom it is addressed for payment; whereas, on the contrary, when the liability is fixed, and the party where liability is so fixed gives the notice, it must mean, if it means anything, that he looks to the party notified for payment.⁵ This rule excludes, not only the person who is in no wise a party to the instrument, but also the person who has been a party to the instrument and liable thereon, but whose liability is discharged.⁶

Notice sent to an indorser or drawer accrues to the benefit of all parties subsequent to the party notified.⁷ The holder may be satisfied with giving notice to his immediate indorser, or he may give notice to the drawer and all the indorsers, and if he does it will accrue to the benefit of each indorser.⁸ This rule is the natural outgrowth of the rule

⁵ East v. Smith, 4 Dowl. & L. 744.

⁶ Harrison v. Ruscoe, 15 Mees. & W. 231; Turner v. Leech, 4 Barn. & Ald. 451; Rowe v. Tipper, 13 C. B. 249; Brown v. Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707; Turner v. Leech, 4 Barn. & Ald. 451. In this case, Abbott, C. J., said: "The plaintiff, who ought to have received notice of the dishonor of the bill of exchange from B. on the 5th of September, did not, in fact, receive notice till the 8th, and therefore he was clearly discharged by the laches of the holder. Then can he, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so; and that, in paying this bill, he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant." Kennedy v. Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289; Stix v. Mathews, 63 Mo. 371; Carter v. Burley, 9 N. H. 558. In an action by the fourth against the first indorsee of a note, all the parties to which resided in London, it was shown that the plaintiff received notice of dishonor from his indorsee on the 20th, and gave notice to his immediate indorser by a letter mailed on the evening of the 21st, but so late that it was not delivered until next morning. This was held to be such laches as to discharge all prior indorsers, though, in the course of the 22d, notice was given to second indorsee and to defendant. Smith v. Mullett, 2 Camp. 208.

⁷ N. I. L. §§ 92, 93.

⁸ Jameson v. Swinton, 2 Taunt. 224; Hilton v. Shepherd, 6 East, 14, note; Stafford v. Yates, 18 Johns. (N. Y.) 327; Morgan v. Van Ingen, 2 Johns. (N. Y.) 204; Spencer v. Ballou, 18 N. Y. 327. It is usual to notify all indorsers—e. g. indorsers for collection; accommodation drawer or indorser; indorsers of bills or notes payable on demand; each partner, as well as the firm, by name; each of the

that notice need not be given by the holder of a bill, but can be given by any party to the instrument. For, as has just been said, the holder may only seek to secure his rights against his immediate indorser by regular notice to him alone. And in order, therefore, that the latter and every other party to the instrument may not be deprived of all remedy against anterior indorsers and the drawer, it is prudent in each party who receives a notice to give immediate notice to those parties against whom he may have the right to claim.⁹ Whether there be few or many indorsers, the duty of each is the same. It is to transmit the notice from one indorser to another, in the usual order of their indorsements.¹⁰ And, in turn, as notice is received by each indorser, it accrues to the benefit of all subsequent parties. Thus, for example, if the holder notifies his immediate indorser, and he, in turn, notifies his immediate indorser, and so on, through the chain of indorsers, up to the second and first indorser, the first indorser cannot object that he has received no notice from the holder. The holder can avail himself of the notice given the first indorser by the second indorser. It is sufficient if the first indorser had notice from any subsequent holder of the note of the default of the maker, and that he would be looked to for payment.¹¹

To Whom Notice Should be Given

The notice of dishonor must be given to the party liable as drawer or indorser, or to his agent authorized to receive

joint indorsers; persons representative, if any; if none, then some authorized person at the family residence; the bankrupt personally; and the assignee of the bankrupt. For cases, see *Tied. Com. Paper*, § 336, and cases cited.

⁹ Bayley, Bills, p. 256; *Chapman v. Keane*, 3 Adol. & El. 183.

¹⁰ *Dobree v. Eastwood*, 3 Car. & P. 250; *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230; *Mead v. Engs*, 5 Cow. (N. Y.) 303; *West River Bank v. Taylor*, 34 N. Y. 128; *Morgan v. Woodworth*, 3 Johns. Cas. (N. Y.) 89.

¹¹ *Stafford v. Yates*, 18 Johns. (N. Y.) 327; *Spencer v. Ballou*, 18 N. Y. 327; *Lysaght v. Bryant*, 9 C. B. 46; *Wilson v. Swabey*, 1 Starke, 34; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1; *Tripplett v. Hunt*, 3 Dana (Ky.) 126; *Stanton v. Blossom*, 14 Mass. 116, 7 Am. Dec. 198; *Bank of United States v. Goddard*, 5 Mason, 366, Fed. Cas. No. 917.

notice.¹² If the party is dead, but his death is unknown to the party giving notice, notice sent as if the party to be notified were living is sufficient.¹³ If his death be known, the notice must be given to a personal representative, if such there be, and if with reasonable diligence he can be found.¹⁴ If there be no personal representative, notice may

¹² *Housego v. Cowne*, 2 Mees. & W. 348; *Allen v. Edmundson*, 2 Exch. 719, 724; *Viale v. Michael*, 30 Law T. (N. S.) 463; *Fassin v. Hubbard*, 56 N. Y. 465; *Lake Shore Nat. Bank v. Butler Colliery Co.*, 51 Hun, 63, 3 N. Y. Supp. 771; *Edwards v. Thomas*, 2 Mo. App. 282; N. I. L. § 97. The fact that the written notice is addressed to the indorser as "treasurer" does not prevent the notice being sufficient to comply with the condition of his individual liability as indorser. *Farmers' Nat. Bank v. Howard*, 71 W. Va. 57, 76 S. E. 122 (N. I. L.). One indorser is not *prima facie* the agent of another for the purpose of receiving notice of dishonor. *Siegel v. Dubinsky*, 56 Misc. Rep. 681, 107 N. Y. Supp. 678 (N. I. L.). Calling up the office of a corporation by phone and telling a clerk there of the dishonor is not sufficient, in the absence of any evidence that such clerk had authority to receive such notices or that he actually brought the notices to the attention of the proper officer of the corporation. *American Nat. Bank v. National Fertilizer Co.*, 125 Tenn. 328, 143 S. W. 597 (N. I. L.). But see *Scarbrough v. City Nat. Bank*, 157 Ala. 577, 48 South. 62, 63, 131 Am. St. Rep. 71 (N. I. L. not cited). It must be remembered, however, that it is not necessary that the notice of dishonor be personally or otherwise actually communicated to the party sought to be notified or to his agent in that behalf. See *infra*, p. 542. All that is necessary to due notice is a compliance with the requirements fixed by the law merchant as essential to a reasonable attempt to effect such an actual communication. See p. 470, *supra*. Compliance with these requirements must also be distinguished from what is, under *all* the circumstances a reasonable effort to comply with them. See § 148, *infra*. The former constitutes "giving notice of dishonor"; the latter "excuse for not giving notice of dishonor." In the former is involved the question, Through what persons or other *agencies* may the notice be given? as well as the inquiry of the present section, which is, Who is the person liable as drawer or indorser, and who is his *agent* to receive notice, within the meaning of the requirement stated at the beginning of this section?

¹³ *Maspero v. Pedesclaux*, 22 La. Ann. 227, 2 Am. Rep. 727; *Linderman's Ex'r's v. Guldin*, 34 Pa. 54. N. I. L. § 98, is, it seems, in accord.

¹⁴ *Massachusetts Bank v. Oliver*, 10 Cush. (Mass.) 557; *Oriental Bank v. Blake*, 22 Pick. (Mass.) 206; *Cayuga County Bank v. Bennett*, 5 Hill (N. Y.) 236; N. I. L. § 98. As holding that a notice of dishonor mailed with the address, "to the estate of H. O., deceased,"

be sent to the last residence or last place of business of the deceased;¹⁶ but if the deceased left a will, and the executor named has not qualified, or has renounced his trust, notice may be sent either to the person named or to the last residence or place of business of the deceased.¹⁷ Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.¹⁸ Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.¹⁹ If the party to be notified is a bankrupt, but no assignee has been appointed, notice to the bankrupt is sufficient;²⁰ if an assignee has been appointed, notice may probably be given either to the bankrupt or to the assignee.²¹

Method of Giving Notice

Where the content of the notice is actually communicated by a proper person to the drawer or indorser, or his agent

will not be such notice as to charge the executor, see Massachusetts Bank v. Oliver, *supra*; Cayuga County Bank v. Bennett, *supra*.

¹⁵ Stewart v. Eden, 2 Caines (N. Y.) 121, 2 Am. Dec. 222; Merchants' Bank v. Birch, 17 Johns. (N. Y.) 25, 8 Am. Dec. 367; Dodson v. Taylor, 56 N. J. Law, 11, 28 Atl. 316; N. I. L. § 98.

¹⁶ Goodnow v. Warren, 122 Mass. 79, 23 Am. Rep. 289.

¹⁷ Hubbard v. Matthews, 54 N. Y. 50, 13 Am. Rep. 562; Dabney v. Stidger, 12 Miss. (4 Smedes & M.) 749; Coster v. Thomason, 19 Ala. 717; Fourth Nat. Bank v. Heuschen, 52 Mo. 207; N. I. L. § 99; Feilspan v. McDonnell, 201 Mass. 341, 87 N. E. 624 (N. I. L.).

¹⁸ Willis v. Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351; State Bank v. Slaughter, 7 Blackf. (Ind.) 133; President, etc., of People's Bank of Baltimore v. Keech, 26 Md. 521, 90 Am. Dec. 118; N. I. L. § 100. N. I. L. § 68, provides: "Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." Under this section it has been held that where notice of dishonor is given to only one of three payees, who, with another party, simultaneously indorsed for the accommodation of the maker, the indorser to whom such notice is given, is liable to the holder. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350 (N. I. L.). See note 3, p. 537, *supra*.

¹⁹ Ex parte Moline, 19 Ves. 216.

²⁰ Callahan v. Bank of Kentucky, 82 Ky. 231; American Nat. Bank v. Junk Bros. Lumber & Manufacturing Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813, *contra*. See Rand. Com. Paper, § 1243; N. I. L. § 101.

to receive notice, within the prescribed time, the method by which the communication is effected is immaterial.²¹ The notice may be either verbal²² or written, and may be given through any agency.²³ Where, however, an attempt to effect such actual communication is relied upon as notice of dishonor, the method of attempted communication is material. The requirements of the law merchant as to the method of giving notice are some of the rules, arising out of the practice of merchants, making more specific the condition of the drawer's or indorser's obligation that reasonable diligence be used to notify him of dishonor and that he is looked to for payment.²⁴ These requirements are

²¹ The fact that the notice is verbal is; however, material in determining whether or not, from the facts actually communicated, an ordinary merchant in the position of the drawer or indorser, or his agent to receive notice, would gather the essential contents of a notice of dishonor. Such a verbal communication, if insufficient in this respect, would be apt to call forth a conversation about the instrument in question. Where, however, the communication is written, questions and answers as to its actual meaning could not be so readily exchanged. Accordingly a verbal notice will sometimes be held sufficient, although a written notice in exactly the same language would be held insufficient. *Metcalfe v. Richardson*, 11 C. B. 1011; *Phillips v. Gould*, 8 Car. & P. 355; *Thompson v. Williams*, 14 Cal. 162.

²² *Cuyler v. Stevens*, 4 Wend. (N. Y.) 566; *Cayuga County Bank v. Warden*, 1 N. Y. 413; *Woodin v. Foster*, 16 Barb. (N. Y.) 146; *Gilbert v. Dennis*, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; *Tindal v. Brown*, 1 Term R. 187; *Glasgow v. Pratte*, 8 Mo. 336, 40 Am. Dec. 142; *Merritt v. Woodbury*, 14 Iowa, 299; *Boyd's Adm'r v. City Sav. Bank*, 15 Grat. (Va.) 501; *Pierce v. Schaden*, 55 Cal. 406 (see N. I. L. §§ 95, 96); *Scarborough v. City Nat. Bank*, 157 Ala. 577, 48 South. 62 (N. I. L.). In the N. I. L. as adopted in Kentucky sections 95 and 96 are so modified as to require a signed written notice of dishonor. *Grayson County Bank v. Elbert*, 143 Ky. 750, 137 S. W. 792. As to notice by telephone, see *C. C. Thompson & Walkup Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933.

²³ See *REED v. SPEAR*, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), *Moore Cases Bills and Notes*, 250. Thus, in any case, if sent by mail and actually received within the prescribed time, the notice is sufficient. *President, etc., of Cabot Bank v. Warner*, 10 Allen (Mass.) 524; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 547, 2 S. E. 888; *Phelps v. Stocking*, 21 Neb. 443, 32 N. W. 217. As to notice by telegraph, see *Russell, Bills*, 320.

²⁴ See *supra*, p. 470.

such that, if they are complied with, it is almost certain that the notice will actually reach the drawer or indorser, or his agent to receive notice.²⁵

The notice may be either written or verbal.²⁶ When verbal, the notice may, in case the drawer or indorser, or his agent to receive notice, cannot, with reasonable diligence, be found at such place,²⁷ be given at the place of business²⁸ or at the place of residence²⁹ of the drawer or indorser, to any person there found, who is reasonably likely to communicate it to the drawer or indorser or his agent to receive notice.³⁰

²⁵ Bank of United States v. Corcoran, 2 Pet. 121, 7 L. Ed. 368; Carolina Nat. Bank v. Wallace, 13 S. C. 347, 36 Am. Rep. 694; Manchester Bank v. Fellows, 28 N. H. 302; Bradley v. Davis, 26 Me. 45; Shelburne Falls Nat. Bank v. Townsley, 107 Mass. 444.

²⁶ Housego v. Cowne, 6 Law J. Exch. 110; Crosse v. Smith, 1 Maule & S. 545; Merritt v. Woodbury, 14 Iowa, 299; First Nat. Bank of Iowa City v. Ryerson, 23 Iowa, 508; Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; N. I. L. §§ 95, 96.

²⁷ Crosse v. Smith, 1 Maule & S. 545; Goldsmith v. Bland, Bayley, Bills (2d Am. Ed.) 271; Howe v. Bradley, 19 Me. 31. But see Scarbrough v. City Nat. Bank, 157 Ala. 577, 48 South. 62, 63, 131 Am. St. Rep. 71 (N. I. L.).

²⁸ Crosse v. Smith, 1 Maule & S. 545; Goldsmith v. Bland, Bayley, Bills (2d Am. Ed.) 271.

²⁹ Smedes v. Utica Bank, 20 Johns. (N. Y.) 372; Louisiana State Bank v. Rowel, 6 Mart. (N. S. La.) 506; Shepard v. Hall, 1 Conn. 329; Hartford Bank v. Stedman, 3 Conn. 489; Bank of Columbia, Use of Bank of United States, v. Lawrence, 1 Pet. 578, 7 L. Ed. 269; Ransom v. Mack, 2 Hill (N. Y.) 590, 38 Am. Dec. 602; Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365, Johns. Cas. Bills & N. 202.

³⁰ A person who was sent by the holder of a dishonored bill called at the house of the drawer the day after it became due, saw the drawer's wife, and told her that he had brought back the bill that had been dishonored. She said she knew nothing about it, but would tell her husband of it when he came home. The party then left, leaving no written notice. It was held that sufficient notice had been given. Housego v. Cowne, 2 Mees. & W. 348. See REED v. SPEAR, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), Moore Cases Bills and Notes, 250. In Crosse v. Smith, 1 Maule & S. 545, 554, Lord Ellenborough, C. J., said: "That brings us to the question whether sending the bill by a clerk after 10 o'clock, and knocking and waiting at the countinghouse door, was sufficient notice in point of law, and we think it was. * * * It has, however, been argued that notice in writing left at the countinghouse or put into the post was necessary;

When written, the notice may, under the same conditions as in the case of verbal notice,⁸¹ be given at the place of business or residence⁸² of the drawer or indorser to any person there found who is reasonably likely to deliver it

but the law does not require it, and with whom was it to be left?" But in the case of Allen v. Edmundson, 2 Exch. 719, where it appeared that the holder of a dishonored bill of exchange went during business hours to the countinghouse of the drawer, for the purpose of giving notice of dishonor, and, finding the countinghouse door shut, he knocked at the door, and, no one answering, he came away without leaving any word, it was held that these facts did not support an allegation of due notice, but were equivalent to a dispensation of notice, and ought to have been so pleaded. Parke, B., said: "In Crosse v. Smith the pleadings were not such as to make it necessary for the court to distinguish between a dispensation of notice and the giving of due notice. * * * If the merchant be not there (at his place of business within business hours) it is his own fault; the holder has done all that is required, and *the not having found any party at the place of business to receive the notice*, is equivalent to a dispensation of it. Therefore there is no question of the propriety of the decision of Crosse v. Smith. But I cannot accede to the case so far as to make the act of going and knocking at the door equivalent to actual notice. If the plaintiff had sent a written notice by post, or had left it by putting it through the door, that would have been an intimation of dishonor, in proper course to have been received by the party; or if the plaintiff found a person there and delivered a verbal notice that would have been enough." See Price v. Warner, 60 Or. 7, 111 Pac. 49, 118 Pac. 173 (N. I. L.). See note 77, p. 557, infra.

⁸¹ AMERICAN EXCH. NAT. BANK v. AMERICAN HOTEL VICTORIA CO., 103 App. Div. 372, 92 N. Y. Supp. 1006 (N. I. L.), Moore Cases Bills and Notes, 248. In this case it was held that leaving a written notice otherwise sufficient at the cashier's window in a hotel was not giving notice of dishonor to the corporation conducting the hotel; it not appearing that the cashier or any one else was present, nor that any effort was made to find at the hotel any officer of the defendant company or any one in charge of the hotel, to whom to deliver such notice. See, also, REED v. SPEAR, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), Moore Cases Bills and Notes, 250.

⁸² Bank of Columbia, Use of Bank of United States, v. Lawrence, 1 Pet. 578, 7 L. Ed. 269; Nevius v. Bank of Lansingburgh, 10 Mich. 547; Sanderson's Adm'r v. Reinstadler, 31 Mo. 483; Grinman v. Walker, 9 Iowa, 426. As to question of due diligence in ascertaining residence, see Bank of Utica v. Bender, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281.

to the drawer or indorser, or his agent to receive notice,³³ or, if no such person is, with reasonable diligence, there to be found, by leaving it where it will probably be discovered.³⁴ The written notice may also, in many cases,³⁵ be given by depositing it in the mails.³⁶ With respect to notice by deposit in the mails a distinction is made between (1) a situation where the person giving notice is, at the time when the notice must be given in order to fulfill the conditions of the drawer's or indorser's obligation, in the place in which the drawer or indorser resides, and (2) a situation where the person giving notice is, at such time, in a place different from that in which the drawer or indorser resides.³⁷ In (1) notice may be given by deposit in

³³ *Bank of United States v. Hatch*, 6 Pet. 250, 8 L. Ed. 387. See *Bradley v. Davis*, 26 Me. 45.

³⁴ *Stewart v. Eden*, 2 Caines (N. Y.) 121, 2 Am. Dec. 222; *Allen v. Edmundson*, 2 Exch. 719, *semble*. See, also, *Williams v. Bank of United States*, 2 Pet. 96, 7 L. Ed. 360.

³⁵ N. I. L. § 96, provides that notice of dishonor "may in all cases be given by delivering it personally or through the mails." And N. I. L. § 105, provides: "Where notice is duly addressed and deposited in the post office, the sender is deemed to have given due notice notwithstanding any miscarriage in the mails." It has been suggested that under the N. I. L. notice may, in all cases, be given by deposit in the mails. *Bigelow, Bills, Notes & Cheques* (2d Ed.) 149. But see *Id.* 152, note 2.

³⁶ In such cases when the notice is properly deposited in the mails, whether or not the notice was actually received is immaterial. *Zoller v. Moffit*, 222 Pa. 644, 72 Atl. 285 (N. I. L.); *State Bank v. Solomon* (Sup.) 84 N. Y. Supp. 976 (N. I. L.). Evidence of the non-receipt of the notice is, however, admissible as tending to prove that the notice was not properly mailed. *Union Bank of Brooklyn v. Deshel*, 139 App. Div. 217, 123 N. Y. Supp. 585 (N. I. L.).

³⁷ For example, if the instrument is dishonored at a place different from that of the residence of the party to be notified. *Hartford Bank v. Stedman*, 3 Conn. 489; *Warren v. Gilman*, 17 Me. 360; *Eagle Bank at Providence v. Hathaway*, 5 Metc. (Mass.) 212. See *Ireland v. Kip*, 10 Johns. (N. Y.) 491; *Bank of Columbia, Use of Bank of United States, v. Lawrence*, 1 Pet. 578, 7 L. Ed. 269; *Sanderson's Adm'r v. Reinstadler*, 31 Mo. 483; *Nevius v. Bank of Lansingburgh*, 10 Mich. 547; *Grinman v. Walker*, 9 Iowa, 426. "It is well settled that, when the indorser resides at the place of the presentment and dishonor of the note, the notice must be served on him personally, or, what is deemed equivalent, must be left at his dwelling or place

the mails (a) in a town or city where letter carriers are employed to deliver letters at the residence or place of business of the drawer or indorser;⁸⁸ (b) where there are several post offices within the corporate limits of the same city or town, between which there is regular communication by mail;⁸⁹ (c) where the party to be notified receives his mail, otherwise than by carrier, from the post office from which mail is ordinarily received by persons resident within the corporate limits of the town, village, or city in which the person to give notice is at the time for giving notice, but has no place of residence or business within such cor-

of business." Comstock, J., in *Van Vechten v. Pruyn*, 13 N. Y. 549. The distinction is often stated, as in sections 103, 104, N. I. L., as being between the situation "where the person giving and the person to receive notice reside in the same place," and the situation "where the person giving and the person to receive notice reside in different places." Difficulty arises in determining what is the meaning of "residence" and of "the same place," within the meaning of the requirements as to notice by mail. One view is that persons residing within the corporate limits of the same city, town, or village are co-residents within the meaning of such requirements. *Barret v. Evans*, 28 Mo. 333. Another view is that all persons who receive their mails through the same post office are to be regarded as residents of the same place. *Ireland v. Kip*, 10 Johns. (N. Y.) 490; *Id.*, 11 Johns. (N. Y.) 231; *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. Rep. 445; *Id.*, 107 Mass. 444; *Farmers' & Merchants' Bank v. Battle*, 4 Humph. (Tenn.) 86; *Barker v. Hall, Mart. & Y.* (Tenn.) 183; *Forbes v. Omaha Nat. Bank*, 10 Neb. 338, 6 N. W. 393, 35 Am. Rep. 480. See the case of *Chouteau v. Webster*, 6 Metc. (Mass.) 1, 39 Am. Dec. 705, in which a citizen of Boston indorsed a note payable at a New York bank, which the maker did not pay at maturity. The indorser was at the time in Washington, as a senator, and notice of non-payment was mailed in due time at New York, addressed to him at Washington. The indorser had a business agent in Boston, but the holder was ignorant of the fact. The notice was held to be sufficient, although not received within the prescribed time.

⁸⁸ *Shoemaker v. Mechanics' Bank*, 59 Pa. 83, 98 Am. Dec. 315; *Walters v. Brown*, 15 Md. 292, 74 Am. Dec. 566; *Dobree v. Eastwood*, 3 Car. & P. 250; *Smith v. Mullett*, 2 Camp. 208. See *Chitty & Hulme, Bills* (13th Am. Ed.) *473.

⁸⁹ *Shaylor v. Mix*, 4 Allen (Mass.) 351; *Curtis v. State Bank*, 6 Blackf. (Ind.) 312, 38 Am. Dec. 143; *Brindley v. Barr*, 3 Har. (Del.) 419; *Gist v. Lybrand*, 3 Ohio, 307, 17 Am. Dec. 595; *Bell v. Hagerstown Bank*, 7 Gill (Md.) 216.

porate limits;⁴⁰ and (d) where there is a local custom, known to the party to be notified, of giving notice by deposit in the mails in this class of cases.⁴¹ In (2) notice may always be given by mail, subject to this limitation, which also applies to (1): That where the person giving the notice knows that communication by mail is cut off, he must use reasonable diligence to give notice by some other method.⁴²

Notice by deposit in the mails is not sufficient, unless the notice is deposited directly in some place for the deposit of mail provided by those in charge of the post office,⁴³ with postage prepaid,⁴⁴ and legibly addressed in accordance with the following rules: "Where a party has added an address to his signature, notice of dishonor must be sent to that address;⁴⁵ but if he has not given such address, then the no-

⁴⁰ *Bank of Columbia, Use of Bank of United States, v. Lawrence*, 1 Pet. 578, 7 L. Ed. 269; *Bank of United States v. Norwood*, 1 Har. & J. (Md.) 423; *Gist v. Lybrand*, 3 Ohio, 307, 17 Am. Dec. 595; *Jones v. Lewis*, 8 Watts & S. (Pa.) 14; *Walker v. Bank of Missouri*, 8 Mo. 704. *Contra*: *Patrick v. Beazley*, 6 How. (Miss.) 609, 38 Am. Dec. 456; *Ransom v. Mack*, 2 Hill (N. Y.) 588, 38 Am. Dec. 602. The decision in *Seneca County Bank v. Neass*, 5 Denio (N. Y.) 329, was based upon a statute.

⁴¹ *Thorn v. Rice*, 15 Me. 263; *Bowling v. Harrison*, 6 How. 248, 12 L. Ed. 425; *Carolina Nat. Bank v. Wallace*, 13 S. C. 347, 36 Am. Rep. 694.

⁴² *Farmers' Bank of Virginia v. Gunnell's Adm'x*, 26 Grat. (Va.) 131. But see N. I. L. §§ 96, 105, 106.

⁴³ Depositing in any letter box in charge of the post-office department is sufficient. *Johnson v. Brown*, 154 Mass. 105, 27 N. E. 994; *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; N. I. L. § 106. Under this section, deposit in a mail chute, under the control of the post office, is deposit in the post office. *Wilson v. Peck*, 66 Misc. Rep. 179, 121 N. Y. Supp. 344 (N. I. L.).

⁴⁴ See *First. Nat. Bank of Shawano v. Miller*, 139 Wis. 126, 120 N. W. 820, 131 Am. St. Rep. 1040 (N. I. L.).

⁴⁵ *Burmester v. Barron*, 17 Q. B. 828; *Morris v. Husson*, 4 Sandf. (N. Y.) 93; *Bartlett v. Robinson*, 39 N. Y. 187. The drawer or indorser may also indicate his address in some other way. *Importers' & Traders' Nat. Bank v. Shaw*, 144 Mass. 424, 11 N. E. 666; *Bank of America v. Shaw*, 142 Mass. 291, 7 N. E. 779; *Lankofsky v. Raymond*, 217 Mass. 98, 104 N. E. 489 (N. I. L.); *Archuleta v. Johnston*, 53 Colo. 393, 127 Pac. 134 (N. I. L.). That this is the cor-

tice must be sent as follows: (1) Either to the post office nearest to his place of residence,⁴⁶ or to the post office where he is accustomed to receive his letters;⁴⁷ or (2) if he live in one place, and have his place of business in another, notice may be sent to either place; or (3) if he is sojourning in another place, notice may be sent to the place where he is so sojourning."⁴⁸

rect interpretation of that part of section 108, N. I. L., quoted in the text, is indicated by the clause "but if he has not given such address."

⁴⁶ Where there are two post offices in the town where the indorser resides, it will be sufficient, *prima facie*, if notice be addressed to him at the town generally. This may, however, be rebutted by proof of the indorser's custom of receiving his letters at one office, and by proof that the holder might, by reasonable diligence, have ascertained this. *Morton v. Westcott*, 8 *Cush.* (Mass.) 425. If the residence or place of business of the drawer or indorser is in a city or large town, it is probably sufficient to address the notice to the city generally, and in his full name, unless it appears that the name is a common one in that city or town. *True v. Collins*, 3 *Allen* (Mass.) 440; *Morse v. Chamberlin*, 144 Mass. 406, 11 N. E. 560; *Riggs v. Hatch* (C. C.) 16 Fed. 840; *Philip & William Ebling Brewing Co. v. Reinheimer*, 32 Misc. Rep. 594, 68 N. Y. Supp. 458 (N. I. L.) semble. This doctrine is disputed. *Walter v. Haynes, Ryan & M.* 149. In this case it was held that a letter directed, "Mr. Haynes, Bristol," containing notice of the dishonor of a bill, was proved to have been put in the post office. It was held that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual charged. See, also, *Benedict v. Schmieg*, 13 Wash. 476, 43 Pac. 374, 36 L. R. A. 703, 52 Am. St. Rep. 61; *E. I. Dupont de Nemour Powder Co. v. Rooney*, 63 Misc. Rep. 344, 117 N. Y. Supp. 220 (N. I. L.). See, however, *Manu v. Moors, Ryan & M.* 249.

⁴⁷ *Bank of Columbia, Use of Bank of United States, v. Lawrence*, 1 Pet. 582, 7 L. Ed. 269; *Mercer v. Lancaster*, 5 Pa. 160. In this case it was held that a notice of dishonor was sufficient, if addressed to an indorser at the post office where he is in the habit of receiving his mail, although such office is not nearest to his residence. *Citizens' Nat. Bank of Romeo v. Cade*, 73 Mich. 449, 41 N. E. 500; *Northwestern Coal Co. v. Bowman*, 69 Iowa, 150, 28 N. W. 496; *Bank of United States v. Carneal*, 2 Pet. 549, 7 L. Ed. 513; *Williams v. Bank of United States*, 2 Pet. 96, 7 L. Ed. 360. Compare, *In re Mandelbaum*, 80 Misc. Rep. 475, 141 N. Y. Supp. 319 (N. I. L.); *Knight v. Infantry Hall Auditorium*, 35 R. I. 383, 87 Atl. 165 (N. I. L.).

⁴⁸ *Chouteau v. Webster*, 6 Metc. (Mass.) 1, 39 Am. Dec. 705; *Bank of Commerce v. Chambers*, 14 Mo. App. 152.

Time of Giving Notice

When the notice of dishonor is given by the holder,⁵⁰ it must be given within a prescribed time after dishonor.⁵¹ When the party to be notified resides in the same place, the notice must be given before the expiration of the secular day⁵¹ following the day of dishonor.⁵² Where the notice is not communicated to the drawer or indorser or his agent within such time, it must be given, if at the place of business of the drawer or indorser, within usual business

⁴⁹ "Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may himself give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder; and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder." N. I. L. § 94. This is declaratory of the law in cases of transfer for collection. Howard v. Ives, 1 Hill (N. Y.) 263; Church v. Barlow, 9 Pick. (Mass.) 547; Scott v. Lifford, 9 East, 347. The various branches of one bank are within the rule. Clode v. Bayley, 12 Mees. & W. 51; Prince v. Bank, 3 App. Cas. 332; Bank of United States v. Goddard, 5 Mason, 366, Fed. Cas. No. 917; Fielding & Co. v. Corry, 46 Wkly. Rep. 97 (under Bills of Exchange Act). See Daniel, Neg. Inst. § 992; Benj. Chalm. Bills & N. 190.

⁵⁰ It cannot be given before the dishonor has actually taken place. Jackson v. Richards, 2 Caines (N. Y.) 343. Notice may be given immediately after dishonor, but is sufficiently prompt if given within the prescribed time. Ex parte Moline, 19 Ves. 216; Bank of Alexandria v. Swann, 9 Pet. 33, 9 L. Ed. 40; Lindenberger v. Beall, 6 Wheat. 104, 5 L. Ed. 216. N. I. L. § 102. The mere fact that bankers in the jurisdiction usually give notice on the very day of dishonor does not establish such time as the period within which notice, to be sufficient, must be given; but notice given within the time prescribed by the law merchant, independent of such practice, is sufficient. Grand Bank v. Blanchard, 40 Mass. (23 Pick.) 305, 307.

⁵¹ In the case of Howard v. Ives, 1 Hill (N. Y.) 263, it was held that "the next day" is to be construed as meaning the next business day, so that, in case of protest on Saturday, notice will be in time if mailed on the following Monday. The indorsee of a bill of exchange left it with his bankers, who presented it for payment on the 4th, when it was dishonored, and on the 5th they returned it to the indorsee, who gave notice of the dishonor to the drawer, on the 6th, by post. Such notice was held to be reasonable. Scott v. Lifford, 9 East, 347.

⁵² Solomon v. Cohen (Sup.) 94 N. Y. Supp. 502 (N. I. L.).

hours,⁵³ or, if at a dwelling house, before the usual hours of rest.⁵⁴ Where, between parties thus residing in the same place, notice may be given by deposit in the mails, it must be so deposited at such a time that, according to the ordinary course of the mail, it will reach the party to be notified on the secular day following dishonor.⁵⁵ Where the party to be notified resides in a different place, the notice, must, if given by mail, be properly deposited in the post office in time to go by a mail of the day following the day of dishonor, if there is a mail which is closed at a reasonable hour on that day.⁵⁶ If there is not such a mail, the notice must be deposited in time to go by the next mail thereafter. Where there is postal communication between the different places, the notice, if given otherwise than by deposit in the mails, must be given within the time in which notice would, in due course of mail, have been received if

⁵³ Allen v. Edmonson, 2 Car. & K. 547; Adams v. Wright, 14 Wis. 408; Garnett v. Woodcock, 6 Maule & S. 44; Parker v. Gordon, 7 East, 385. See, however, N. I. L. § 103 (subd. 1).

⁵⁴ In the case of Jameson v. Swinton, 2 Taunt. 224, the bill was shown to have been dishonored on July 10th. At 4 o'clock p. m. of the same day notice was given to the last indorser. At 8 or 9 o'clock on the night of the 11th this last indorser gave the defendant notice. It was held that the last indorser gave notice soon enough to entitle him to recover against the defendant. See, however, N. I. L. § 103 (subd. 2).

⁵⁵ Chitty & Hulme, Bills (13th Am. Ed.) *473; N. I. L. § 103 (subd. 3); Wilson v. Peck, 66 Misc. Rep. 179, 121 N. Y. Supp. 344 (N. I. L.).

⁵⁶ Tindal v. Brown, 1 Term R. 167; Darblshire v. Parker, 6 East, 3; Lenox v. Roberts, 2 Wheat. 373, 4 L. Ed. 264; Stainback v. Bank of Virginia, 11 Grat. (Va.) 269; N. I. L. § 104 (subd. 1). See First Nat. Bank of Shawano v. Miller, 139 Wis. 126, 120 N. W. 820, 131 Am. St. Rep. 1040 (N. I. L.). It seems to have been originally held that the notice must be put into the post office early enough to be sent by the mail of the day following the day of dishonor. Bank of Alexandria v. Swann, 9 Pet. 33, 9 L. Ed. 40. But it often happened that the mail of the day succeeding the day of dishonor went out at unreasonable hours; that is, before a reasonable time could be had for depositing the notice, for example, soon after midnight, or at a very early hour in the morning, and in such cases was sometimes made up and closed the evening preceding. Hence the rule as stated in the text. See Mackintosh v. Gibbs, 81 N. J. Law, 577, 80 Atl. 554, Ann. Cas. 1912D, 163 (N. I. L.).

it had been deposited in the post office in due time.⁵⁷ Where there is no such postal communication, the notice must be given with ordinary diligence.⁵⁸ Where the notice is given by some party other than the holder, "he has, after the receipt of notice, the same time for giving notice of dishonor to antecedent parties that the holder has after dishonor."⁵⁹

WHEN PRESENTMENT, PROTEST, OR NOTICE OF DISHONOR IS EXCUSED

148. Presentment is excused when, after the exercise of reasonable diligence, it cannot be made; and notice of dishonor is excused when, after the exercise of reasonable diligence, it cannot be given. Protest is, it seems, excused by any circumstances which would excuse notice of dishonor.⁶⁰

⁵⁷ *Darbshire v. Parker*, 6 East, 3; *Bank of Columbia, Use of Bank of United States, v. Lawrence*, 1 Pet. 578, 7 L. Ed. 269; *Jarvis v. St. Croix Mfg. Co.*, 23 Me. 287; *Fielding v. Corey*, [1898] 1 Q. B. 268; N. I. L. § 104 (subd. 2).

⁵⁸ See *Chitty & Hulme*, Bills (13th Am. Ed.) *473.

⁵⁹ *Sheldon v. Benham*, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; *Howard v. Ives*, 1 Hill (N. Y.) 263; *Lawson v. Farmers' Bank of Salem*, 1 Ohio St. 206, Johns. Cas. Bills & N. 203; *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. Rep. 445; *Simpson v. Turney*, 5 Humph. (Tenn.) 419, 42 Am. Dec. 443; *Seaton v. Scovill*, 18 Kan. 435, 21 Am. Rep. 212, note, 26 Am. Rep. 779; *Bray v. Hadwen*, 5 Maule & S. 68; N. I. L. § 107; *Jurgens v. Wichmann*, 124 App. Div. 531, 108 N. Y. Supp. 881 (N. I. L.); *Gleason v. Thayer*, 87 Conn. 248, 87 Atl. 790 (N. I. L.). See *Brill v. Jefferson Bank*, 159 App. Div. 461, 144 N. Y. Supp. 539 (N. I. L.). It was decided in the case of President, etc., of *Fitchburg Bank v. Perley*, 2 Allen (Mass.) 433, that an indorser of a dishonored note will be rendered liable to a subsequent indorser, if such indorser, having received a duplicate notice from notary of holder, for the prior indorser, mailed it, with the proper address, on the day of its receipt, although it did not reach its destination as soon as if it had been sent by the holder or notary. In *Geill v. Jeremy, Moody & M.* 61, it was held that a party receiving notice of dishonor of a bill of exchange need not give notice to the party above him till the next post after the day

⁶⁰ N. I. L. §§ 111, 159.

The rule of the common law, that inability to perform the terms or conditions of a contract by reason of inevitable accident or casualty constitutes no excuse for non-performance, does not apply to the presentment of negotiable instruments and notice of their dishonor, because the implied conditions of the drawer's and indorser's contract are performed by using due diligence to effect presentment and notice of dishonor.⁶¹ The holder, if he has used due diligence in presenting the bill or note, and in notifying parties of its dishonor, has done all the law requires of him.⁶² But he must use due diligence to comply with each of these conditions. For, where presentment is excused, the instrument is, if unpaid, dishonored, and notice of this dishonor is as

on which he himself receives the notice, although he might easily give it that day, and there is no post on the following day. *Mitchell v. Cross*, 2 R. I. 437; *West v. Brown*, 6 Ohio St. 542; *Chick v. Pillsbury*, 24 Me. 458, 41 Am. Dec. 394.

⁶¹ See *supra*, § 132.

⁶² *Farmers' Bank of Virginia v. Gunnell's Adm'r*, 26 Grat. (Va.) 131; N. I. L. §§ 82 (subd. 1), 112. Due diligence thus excuses delay as well as entire failure to present or give notice. *Windham Bank v. Norton*, 22 Conn. 213, 56 Am. Dec. 397; *Patience v. Townley*, 2 J. P. Smith (Eng.) 223; *Pier v. Heinrichshoffen*, 67 Mo. 163, 29 Am. Rep. 501; *The Elmville*, [1904] P. 319. But in such case presentment must be made or notice given within a reasonable time after the cause excusing delay ceases to operate. *Tardy v. Boyd's Adm'r*, 26 Grat. (Va.) 631; *Studdy v. Beesty*, 60 T. L. R. 647. N. I. L. § 81, provides: "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence." See *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925 (N. I. L.). N. I. L. § 113, provides: "Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence." See N. I. L. § 147. See, also, *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843; *Young v. Exch. Bank of Ky. (Ky.)* 153 S. W. 144 (N. I. L.); *Sublette Exchange Bank v. Fitzgerald*, 168 Ill. App. 240 (N. I. L.).

necessary for the protection of the drawer or indorser as if presentment had been made.⁶³

Diligence on his part is measured by the general convenience of business men.⁶⁴ War,⁶⁵ disease,⁶⁶ the suspension of commercial intercourse by superior force, such as the public and positive prohibition of commerce, occupation of a country by public enemies,⁶⁷ and the like, excuse presentment and notice.

In cases of absence, death, or inability to discover the

⁶³ *Foster v. Julien*, 24 N. Y. 28, 80 Am. Dec. 320; *Spies v. Gilmore*, 1 N. Y. 321; *McGruder v. Bank of Washington*, 9 Wheat. 598, 6 L. Ed. 170; *Leonard v. Olson*, 99 Iowa, 162, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230; N. I. L. §§ 83, 89; *REED v. SPEAR*, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), Moore Cases Bills and Notes, 250.

⁶⁴ *Windham Bank v. Norton*, 22 Conn. 213, 56 Am. Dec. 397; *Patience v. Townley*, 2 J. P. Smith (Eng.) 223; *Farmers' Bank of Virginia v. Gunnell's Adm'r*, 26 Grat. (Va.) 181; *Schofield v. Bayard*, 3 Wend. (N. Y.) 488. It seems that whether or not reasonable diligence has been shown is a question of law. *Vogel v. Starr*, 132 Mo. App. 430, 112 S. W. 27 (N. I. L.). See p. 510, supra. But in *Brewster v. Shrader*, 26 Misc. Rep. 480, 486, 57 N. Y. Supp. 606, 611, in holding that the question was whether or not, under the facts, due diligence had been used in attempting to give notice, the court said: "We think this question was properly submitted to the jury as a question of fact. The question of what is reasonable diligence must be determined with reference to what would have suggested itself as necessary, under the existing circumstances, to a man of ordinary prudence and intelligence." See *REED v. SPEAR*, 107 App. Div. 144, 94 N. Y. Supp. 1007 (N. I. L.), Moore Cases Bills and Notes, 250.

⁶⁵ *Scholefield v. Eichelberger*, 7 Pet. 586, 8 L. Ed. 793; *United States v. Grossmayer*, 9 Wall. 75, 19 L. Ed. 627; *Berry v. Southern Bank of Kentucky*, 2 Duv. (Ky.) 379; *James v. Wade*, 21 La. Ann. 548 (this case holds that the holder of commercial paper must use all other means possible to give notice to the party to be charged when by reason of circumstances the mail cannot be used).

⁶⁶ *Billgerry v. Branch*, 19 Grat. (Va.) 393, 100 Am. Dec. 679; *Morgan v. Bank of Louisville*, 4 Bush (Ky.) 82; *Norris v. Despard*, 38 Md. 491; *Tunno v. Lague*, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141. As holding that the illness of one's wife will not excuse delay in giving notice of dishonor, see *Turner v. Leach, Chit. Bills & N.* (10th Ed.) 332, note 13.

⁶⁷ *Polk v. Spinks*, 5 Cold. (Tenn.) 431, 98 Am. Dec. 426; *Tardy v. Boyd's Adm'r*, 26 Grat. (Va.) 632.

residence of the maker or acceptor, the question is one of diligence.⁶⁸ When the maker of a note or acceptor of a bill has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold all the indorsers.⁶⁹ Where the maker or acceptor is a seaman on a voyage, having no domicile, the indorser is liable without a demand being made;⁷⁰ and in every case where the maker or acceptor has no known place of residence, or place at which the note can be presented, the holder will in like manner be excused from making any demand whatever.⁷¹ The commonest instance of this last general statement is where the maker or acceptor removes from the state, and continues to reside abroad until its maturity. It is deemed in such cases a better business rule that the holder shall not be bound to seek out the maker or acceptor or his place of residence in the state to which he has removed for the purpose of presenting the instrument and demanding payment.⁷² It is probably also the law that he is not bound to present it at the last known place of residence or business of the maker or acceptor.⁷³ In such case presentment will clearly be

⁶⁸ If the place of business or residence of the maker, drawee, or acceptor cannot, after reasonable diligence, be ascertained, further diligence to effect presentment is excused. *Bateman v. Joseph*, 12 East, 433; *Freeman v. Boynton*, 7 Mass. 483; *Collins v. Butler*, 2 Strange, 1087; *Browning v. Kinnear*, 1 Gow, 81. See *Hine v. Alley*, 4 Barn. & Adol. 624. See, also, *Union Bank v. Fowlkes*, 34 Tenn. (2 Sneed) 555, 560, 561; *Wolfe v. Jewett*, 10 La. 383. If payable at a particular place, which no longer exists, presentment is excused. So where such place cannot, after reasonable diligence, be ascertained. See *Hutchison v. Crutcher*, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89. *Erwin v. Adams*, 2 La. 318; *Waring v. Betts*, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890. As to what is reasonable diligence in making inquiry, see *Lambert v. Ghiselin*, 9 How. 552, 13 L. Ed. 254; *Hutchison v. Crutcher*, *supra*; *Daniel, Neg. Inst.* §§ 1115-1123.

⁶⁹ *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206; *Lehman v. Jones*, 1 Watts & S. (Pa.) 126, 37 Am. Dec. 455; *Taylor v. Snyder*, 3 Denio (N. Y.) 145, 45 Am. Dec. 457.

⁷⁰ *Barrett v. Wills*, 4 Leigh (Va.) 114, 26 Am. Dec. 315; *Moore v. Coffield*, 12 N. C. 247.

⁷¹ *Erwin v. Adams*, 2 La. 318; *Adams v. Leland*, 30 N. Y. 309.

⁷² *Anderson v. Drake*, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442.

⁷³ In *Dennie v. Walker*, 7 N. H. 199, it was held by Upham, J., that "a removal beyond the bounds of the government, after the making

sufficient if made at the last known place of residence or of business.⁷⁴ In case of death of the maker or acceptor, the general principle which we have stated above governs the case. If the instrument is made payable at a bank or other particular place, it must be still presented there. If its presentment be impossible, because of the death of the maker or acceptor, and no one can be found to whom to make presentment, its presentment will be excused. If a personal representative has been appointed, presentment and demand must be made to him.⁷⁵ And if there is no personal representative, and at the time of his death the maker or acceptor had a known place of residence, presentment should be made at his former residence.⁷⁶ In this case, as in all others, the death of the acceptor or maker never dispenses with notice to the drawers and indorsers of the fact of non-acceptance or of non-payment.⁷⁷

of a note, and before it comes due, and where no place of payment of the note is specified, renders a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly."

⁷⁴ Adams v. Leland, 30 N. Y. 309; Foster v. Julien, 24 N. Y. 28, 80 Am. Dec. 320; McGruder v. Bank of Washington, 9 Wheat. 598, 6 L. Ed. 170; Dennie v. Walker, 7 N. H. 190; Wheeler v. Field, 6 Mete. (Mass.) 290; Herrick v. Baldwin, 17 Minn. 209 (Gil. 183), 10 Am. Rep. 161; Gist v. Lybrand, 3 Ohio, 308, 17 Am. Dec. 595; Central Bank v. Allen, 16 Me. 41.

⁷⁵ Magruder v. Union Bank of Georgetown, 8 Curt. Dec. 299, 3 Pet. 87, 7 L. Ed. 612; Toby v. Maurian, 7 La. 493; Harp v. Kenner, 19 La. Ann. 63; Gower v. Moore, 25 Me. 16, 43 Am. Dec. 247; Shoenerberger's Ex'r v. Lancaster Sav. Inst., 28 Pa. 459; ante, p. 488.

⁷⁶ Bank of Washington v. Reynolds, 2 Cranch, C. C. 289, Fed. Cas. No. 954.

⁷⁷ Oriental Bank v. Blake, 22 Pick. (Mass.) 208. With respect to notice of dishonor, the inability after reasonable diligence to discover the place of business or residence of the party to be notified at least temporarily excuses the failure to give notice. In Gladwell v. Turner, L. R. 5 Exch. 59, all the parties to the bill were shown to reside in London. On the morning after the dishonor of the bill, the plaintiff, who did not know the residence of the defendant (the drawer), applied to S. for information. The latter was not at home, and the plaintiff did not obtain his information until 5:30 p. m. of the same day. He posted his notice of dishonor after 6 p. m., and it was not received that night. It was held that, under the circumstances, the notice was not too late. If the party to be charged, unknown to

WHEN DUE DILIGENCE TO EFFECT PRESENTMENT, PROTEST, AND NOTICE OF DISHONOR IS DISPENSED WITH

- 148a. Presentment, protest, and notice of dishonor, or reasonable diligence to effect them, are dispensed with in the case of a drawer or indorser whose duty it is as between himself and the prior parties to the instrument, to pay it at maturity.⁷⁸
- 148b. Presentment, protest,⁷⁹ or notice of dishonor may be dispensed with by waiver, express or implied.

Where the drawer, through his own fault, has no reason to expect the bill will be paid, his act in drawing the bill is

the holder, changes his place of residence after drawing or indorsing the bill or note, the holder may nevertheless still address the notice to his former place of residence, provided he in good faith supposed he was addressing it to the actual place of residence of such party. See *Munn v. Baldwin*, 8 Mass. 316; *Requa v. Collins*, 51 N. Y. 148; *Ward v. Perrin*, 54 Barb. (N. Y.) 89. In *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639, a bill was shown to have been drawn on a company, and accepted by the manager. The defendant and another director indorsed. At maturity the bill was not paid, as the affairs of the company were being wound up. The plaintiff did not know the defendant's place of residence, so he sent the notice to him at the company's office. The defendant had for some time ceased to come there, since the company had become embarrassed. The notice was held to be good under the circumstances. In the case of *Rawdon v. Redfield*, 2 Sandf. (N. Y.) 178, it was shown that at the date of the note the indorser lived in Troy, but before maturity of the note he moved to New York. His name was not in the directory, however, and the notary who protested the bill in New York, being informed by the holder and acceptor, that Troy was the place of residence of the indorser, mailed him a notice to that place. This was held to be sufficient notice. See *J. H. Mohlman Co. v. McKane*, 60 App. Div. 546, 69 N. Y. Supp. 1046 (N. I. L.); *Albany Trust Co. v. Frothingham*, 50 Misc. Rep. 598, 99 N. Y. Supp. 343 (N. I. L.). Where no effort is made to find out the correct address, notice of dishonor is, of course, not excused. *Fonseca v. Hartman* (Sup.) 84 N. Y. Supp. 131 (N. I. L.); *E. I. DuPont de Nemours Powder Co. v. Rooney*, 63 Misc. Rep. 344, 117 N. Y.

⁷⁸ 2 Ames Cas. Bills & N. 813.

⁷⁹ See *supra*, 523.

a very unusual mercantile transaction. In such a case his liability is fixed without the exercise of any diligence to effect presentment and notice of dishonor.⁸⁰ But it is not necessary that the drawer have funds in the hands of the drawee. Thus presentment and notice are not dispensed

Supp. 220 (N. I. L.); *T. F. Smith Co. v. America-Europe Co.* (Sup.) 128 N. Y. Supp. 81 (N. I. L.). It is not sufficient diligence merely to look through a city directory. *Bacon v. Hanna*, 137 N. Y. 382, 33 N. E. 303, 20 L. R. A. 495. Nor is it due diligence for a notary, acting as agent for the holder, to ask only the receiving teller at the holder bank as to the address of an indorser, where there were accessible officers of the bank much more likely to supply such information. *Sweet v. Woodin*, 72 Mich. 393, 40 N. W. 471. But where a notary made inquiries of several persons as to the post-office address of an indorser, all of whom appeared to possess some information on the subject and expressed the belief that a certain town was the proper address of the indorser, and that town was the nearest town to the indorser's farm, and was a much larger town than the town at which the indorser in fact received his mail, and the notary acted in good faith, a notice of dishonor mailed by him to such town was sufficient. *Vogel v. Starr*, 132 Mo. App. 430, 112 S. W. 27 (N. I. L. not cited). See N. I. L. § 108 (subd. 1). In *Price v. Warner*, 60 Or. 7, 111 Pac. 49, 118 Pac. 173 (N. I. L.), it appeared that the person giving notice and the defendant indorser resided in the same place; that the person giving notice went, on the day after dishonor, to the defendant's place of business, and found that he was temporarily absent from the city; that he repeated his visits for four or five days, and, on each day, found him still absent; that after that he saw the defendant and gave him notice. It was held that the defendant was discharged. The decision seems correct, because it was possible to give notice by leaving a message at the place of business of the defendant. But the statement by the court that notice must be given either personally or by mail seems erroneous. See *supra*, p. 544, note 30.

⁸⁰ *Terry v. Parker*, 6 Adol. & E. 502. In this case it was held that if the drawer of a bill of exchange have no effects in the hands of the drawee at the time of drawing the bill, and of its maturity, and have no ground to expect that it will be paid, it is not necessary to present the bill at maturity; and if it be presented two days after, and payment be refused, the drawer is liable. *Mobley v. Clark*, 28 Barb. (N. Y.) 390; *Kinsley v. Robinson*, 21 Pick. (Mass.) 327; *Caunt v. Thompson*, 7 C. B. 400. In *Lawrence v. Schmidt*, 35 Ill. 440, it was held that notice of dishonor is unnecessary where the drawer of a check payable in money has no funds in bank, except depreciated bank bills which the payee refuses to accept, and the bank refuses to pay in money. But see *St. John v. Homans*, 8 Mo. 382.

with where the drawee, though he has no funds of the drawer in his hands, has promised to accept the bill for the drawer's accommodation,⁸¹ nor where the drawer has consigned property to the drawee which he draws against,⁸² nor where there is a running account between the drawer and drawee,⁸³ nor in any other case where he has reason to expect that his draft would be honored.⁸⁴ The test to be applied is whether the drawer had a right to expect or require that the drawee would honor his bill.⁸⁵ If the courts

⁸¹ *Walwyn v. St. Quintin*, 1 Bos. & P. 652; *Adams v. Darby*, 28 Mo. 162, 75 Am. Dec. 115; *Oliver v. President, etc., of Bank of Tennessee*, 11 Humph. (Tenn.) 74.

⁸² *Dickins v. Beal*, 10 Pet. 572, 9 L. Ed. 538; *Grosvenor v. Stone*, 8 Pick. (Mass.) 79. Where one drew a bill of exchange on a person to whom he had shipped goods on his own account, he is entitled to notice of dishonor, although in fact the drawee had not received the goods when the bill was presented for acceptance. *Rucker v. Hiller*, 16 East, 43; *Brown v. Cronise*, 21 Cal. 386; *Green v. Cummins*, 14 Bush (Ky.) 174; *Jennison v. Parker*, 7 Mich. 355; *Stam v. Kerr*, 31 Miss. 199; *Gale v. Walsh*, 5 Term R. 239; *Peacock v. Pursell*, 14 C. B. (N. S.) 728; *Rucker v. Hiller*, 16 East, 43, 3 Camp. 217.

⁸³ *Urquhart v. Thomas*, 24 La. Ann. 95.

⁸⁴ *Thackray v. Blackett*, 3 Camp. 164; *Legge v. Thorpe*, 12 East, 171. Thus, in the case of *Blackhan v. Doren*, 2 Camp. 503, it was held that if the drawer of a bill of exchange, when presented for acceptance, has effects in the hands of the drawees, though he is indebted to them for a much larger amount, and they, without his knowledge, have appropriated these effects to the satisfaction of the debt, he is entitled to notice of dishonor for nonacceptance, as he might expect under these circumstances that the bill would be accepted and paid. See, also, *Carew v. Duckworth*, L. R. 4 Exch. 313; *Hopkirk v. Page*, 2 Brock. 34, Fed. Cas. No. 6,697; *Cathell v. Goodwin*, 1 Har. & G. (Md.) 468; *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259. So if a bill of exchange be drawn upon a person as the treasurer of a railroad company, and the drawer has theretofore in the regular course of his business as an agent of said company been permitted to draw similar bills upon such drawee, which have always been accepted and paid by such treasurer, and the said bill of exchange be dishonored, such drawer is entitled to notice of such dishonor, although at the time he drew the bill he had no funds of his own in the hands of such drawee. *Thornburg v. Emmons*, 23 W. Va. 325.

⁸⁵ It has been said: "The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands;

can find such a legal right or just expectation on his part, failure to present the bill, or to give him notice of its dishonor, discharges him.⁸⁶

and, if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately. But, if he has no effects in the other's hands, then he cannot be injured for want of notice." Buller, J., in *Bickerdike v. Bollman*, 1 Term R. 405. For a holding to the same effect, by the same judge, see *Corney v. Da Costa*, 1 Esp. 302. See, also, *Dennis v. Morrice*, 3 Esp. 158; *Sands v. Clarke*, 8 C. B. 751. Relying upon this statement of the principle underlying the dispensing, in certain situations, with due diligence, it has in some cases been held that, where it can be clearly shown that no damage to the drawer or indorser could have resulted from the failure to use such diligence to make presentment and give notice, such diligence is dispensed with. *Bond v. Farnham*, 5 Mass. 170,

⁸⁶ This statement should be qualified. Thus an indorser may by representation estop himself to deny that presentment has been made and notice of dishonor given. *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804. And where the drawer or indorser is under a legal duty toward the holder or a party to the instrument to make presentment or to give notice, he cannot set up his own failure to present or give notice as a defense in an action against him as indorser by such holder or other party. *Auten v. Manistee Nat. Bank*, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329; *Yates v. Goodwin*, *supra*; *Gleeson v. Lichy*, 62 Wash. 656, 114 Pac. 518 (N. I. L.); *Pennock v. West*, 52 Pa. Super. Ct. 138 (N. I. L.). Compare *Re Fenwick*, [1902] 1 Ch. 507; *First Nat. Bank v. Bickel*, 154 Ky. 11, 156 S. W. 856 (N. I. L.). But the fact that a note is, at maturity, held by a bank of which the indorser is president and director, does not dispense with the necessity of presentment and notice to charge such indorser. *Ennis v. Reynolds*, 127 Ga. 112, 56 S. E. 104; *First Nat. Bank v. Bickel*, 154 Ky. 11, 156 S. W. 856 (N. I. L.). In *Schoepfer v. Tommack*, 97 Ill. App. 562, the court went so far as to hold that, as against a person who was treated as an indorser, it was unnecessary to prove presentment and notice of dishonor, where it appeared that such person, before maturity, requested and secured the possession of the instrument which he retained until after maturity. An even more questionable case is *Hays v. Citizens' Sav. Bank*, 101 Ky. 201, 40 S. W. 573, where the action was upon a bill of exchange drawn in the name of "J. D. Hays," under which Moore and Hays did business as partners. The plaintiff bank, of which Moore was cashier, became the holder of the bill, but, on dishonor, failed to protest it or give notice of dishonor to Moore or Hays. It was held that Hays was nevertheless liable to the plaintiff, on the ground that Moore had, for the partnership, waived protest and notice.

But these reasons do not apply to dispense with presentment and notice of dishonor as against an indorser,⁸⁷ unless

4 Am. Dec. 47; *Commercial Bank of Albany v. Hughes*, 17 Wend. (N. Y.) 94. In the latter case Cowen, J., said: "Formerly it was necessary, in order to complete the defense, that the drawer should prove damage to himself arising from the holder's laches; but now it will be presumed. Chitty, on Bills, 355. Yet the presumption is not conclusive. If it appear in truth that no damage could arise, the necessity for presentment or notice does not exist. One instance is the common one, already mentioned, of no effects with the drawee, or their being withdrawn. So if the indorser has accepted a general assignment of the maker's estate, and effects. *Barton v. Baker*, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620." This statement of the rule has been frequently approved by the courts of New York. *Mechanics' Bank v. Griswold*, 7 Wend. (N. Y.) 168; *Smith v. Miller*, 52 N. Y. 545, semble; *O'Neill v. Meighan*, 32 Misc. Rep. 516, 66 N. Y. Supp. 313, semble; *Hayward v. Empire State Sugar Co.*, 105 App. Div. 21, 93 N. Y. Supp. 449, semble. But even in New York the insolvency of the drawee, acceptor, or maker does not dispense with due diligence. *Murphy v. Levy*, 23 Misc. Rep. 147, 50 N. Y. Supp. 682; *O'Neill v. Meighan*, 32 Misc. Rep. 516, 66 N. Y. Supp. 313; *Moore v. Alexander*, 63 App. Div. 100, 71 N. Y. Supp. 420. It has been so held even though the presentment of the check in question, if it had been made within a reasonable time after the indorsement of the defendant, might have been after the drawee bank had closed its doors. *Murphy v. Levy*, supra. In such a case it seems that no loss could have resulted to the indorser from the unreasonable delay in presentment. See, also, *Moore v. Alexander*, 33 Misc. Rep. 613, 68 N. Y. Supp. 888, affirmed 63 App. Div. 100, 71 N. Y. Supp. 420. The N. I. L. (sections 70, 82, 113, 114) seems clearly opposed to the view approved in New York. *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861 (N. I. L.). But see *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. Supp. 359 (N. I. L.). In that case the complaint alleged that the defendant indorsed the promissory note in suit; that it was made by the corporation of which he was president; that before the maturity of the note an involuntary petition in bankruptcy was filed against such corporation and a receiver appointed; that the defendant, as president of the corporation, pursuant to a vote of the directors, filed a written admission of its inability to pay its debts, ex-

⁸⁷ *Carter v. Flower*, 16 Mees. & W. 743; *Brown v. Maffey*, 15 East, 216; *Glasgow v. Copeland*, 8 Mo. 268; *Warder v. Tucker*, 7 Mass. 449, 5 Am. Dec. 62; *Rea v. Dorrance*, 18 Me. 137; *Start v. Tupper*, 81 Vt. 19, 69 Atl. 151, 15 L. R. A. (N. S.) 213, 130 Am. St. Rep. 1015; *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241.

he has indorsed with knowledge of the fact that the drawer has no right to expect acceptance or payment.⁸⁸

pressing a willingness that it be adjudicated bankrupt; that at the time of the maturity of the note in suit the business of the corporation was closed and its effects were in the hands of a receiver, to the knowledge of the defendant. A demurrer to this complaint was overruled, on the ground that these facts, as alleged, constituted an implied waiver by the defendant of presentment and notice of dishonor. The court said (129 App. Div. 93, 113 N. Y. Supp. 361): "When the notes in question fell due the maker could not pay. The indorser knew it, because he had participated in the act which made it impossible for it to pay; and for that reason a failure to present the notes for payment and give him notice of non-payment could not, by any possibility, have injured him." This decision, in effect, seems to apply the rule approved by the New York courts prior to the enactment of the N. I. L. in that state. The correct view, it seems, is that compliance with these conditions is dispensed with only when the drawer or indorser has no reason to expect or require that the drawee or acceptor will honor the instrument, and thus has acted in bad faith according to the practice of merchants. *Beauregard v. Knowlton*, 156 Mass. 395, 31 N. E. 389; *Lester-Whitney Shoe Co. v. Oliver Co.*, 1 Ga. App. 244, 58 S. E. 212; *Lawrence v. Hammond*, 4 App. D. C. 467; N. I. L. §§ 79, 114-4&5 (as to drawer). But see (as to indorser) N. I. L. §§ 80, 115; *In re Swift* (D. C.) 106 Fed. 65 (N. I. L.). In *Orr v. Maginnis*, 7 East, 359, it appeared that the drawer had effects in the hands of the drawees at the time of drawing, but subsequently, and before the bill was due or presented for acceptance, the drawees, having no notice of the bill, paid the whole balance in their hands to the drawer. On dishonor by non-acceptance, notice was not given. It was argued by counsel that notice was not necessary, since the defendant drawer could not have received any damage because of its omission. It was held, however, that the drawer was discharged. Lord Ellenborough said, referring to *Bickerdike v. Bollman*, *supra*: "And I know it has been a subject of regret with the very learned person who was counsel for the plaintiff in that case that the old rule requiring notice to be given in all cases to the drawer of the non-acceptance of his bill was so far broken in upon, but I shall anxiously resist the further extension of the

⁸⁸ *French v. Bank of Columbia*, 4 Cranch, 141, 2 L. Ed. 576; *Leach v. Hewitt*, 4 Taunt. 731; *Susori v. Thomlinson*, *Selwyn's Nisi Prius* (13th Ed.) 290, 291; *Bogy v. Kell*, 1 Mo. 743, *semble*; *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241, *semble*; *Start v. Tupper*, 81 Vt. 19, 69 Atl. 151, 15 L. R. A. (N. S.) 213, 130 Am. St. Rep. 1015, *semble*; *Churchill v. Yeatman, Gray Grocer Co. (Ark.)* 164 S. W. 283. As to N. I. L., see note 85, p. 560, *supra*.

A drawer or indorser who is the accommodating party may insist upon presentment and notice;⁸⁹ but not if he is the accommodated party, and for this or some other reason it is understood that he will pay the instrument at maturity.⁹⁰

exemption." See, also, *Susori v. Thomlinson*, London Sittings, 1805, cited and considered in Selwyn's *Nisi Prius* (13th Ed.) 290, 291. See note 84, *supra*. It is well settled that the insolvency of the drawee does not dispense with due diligence, *Leonard v. Olson*, 99 Iowa, 162, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230; *Fugitt v. Nixon*, 44 Mo. 295; even though that insolvency be known to the drawer or indorser at the time of drawing or indorsing, *Sandford v. Dillaway*, 10 Mass. 52, 6 Am. Dec. 99; *Carson, Pirie, Scott & Co. v. Fincher*, 129 Mich. 687, 89 N. W. 570, 95 Am. St. Rep. 449. See *Hamlin v. Simpson*, 105 Iowa, 125, 74 N. W. 906, 44 L. R. A. 397; *Bogy v. Kell*, 1 Mo. 743.

⁸⁹ *Cory v. Scott*, 3 Barn. & Ald. 619; *Turner v. Samson*, 2 Q. B. Div. 23; *Miser v. Trovinger's Ex'rs*, 7 Ohio St. 281. In the case of *Turner v. Samson*, *supra*, Mellish, L. J., said: "It appears beyond all doubt that the bill was an accommodation bill, and that the drawer and the other defendants, as indorsers, all signed the bill for the accommodation of S. The question is, in substance, whether the defendant (the appellant) was entitled to notice. He was plainly not the person who was to take up the bill, and he had a right to suppose that another person would see that it was taken up. It appears to me that the defendant was in the same position as if the acceptor had been the person who was ultimately liable to pay."

⁹⁰ *McVeigh v. Bank of Old Dominion*, 26 Grat. (Va.) 785; *Ex parte Heath*, 2 Ves. & B. 240; *Miser v. Trovinger's Ex'rs*, 7 Ohio St. 281; *Rhett v. Poe*, 2 How. 457, 11 L. Ed. 338; *American Nat. Bank v. Junk Bros. Lumber & Manufacturing Co.*, 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492; *Taylor v. Vossburg Mineral Springs Co.*, 128 Ga. 364, 54 South. 907. See N. I. L. §§ 80, 114 (subd. 4), 115. It has been held that a stockholder of a corporation who indorsed a note given to raise money for it, and thus for the benefit of himself and the other stockholder indorsers, was an accommodated party, whose liability was fixed without notice. The decision, however, was also put on another ground. *Mercantile Bank of Memphis v. Bushby*, 120 Tenn. 652, 113 S. W. 390 (N. I. L.). See, also, *Ennis v. Reynolds*, 127 Ga. 112, 56 S. E. 104. This conclusion seems unsound, since a stockholder is not under any legal duty to meet the obligations of the corporation. Accordingly, the weight of authority is contra. *Luckenbach v. McDonald* (C. C.) 164 Fed. 296 (N. I. L.); *First Nat. Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790 (N. I. L.). See, also, *Brown v. Crofton*, 76 S. W. 327, 25 Ky. Law Rep. 753; *Jordan v. Reed*, 77 N.

Thus when the drawer or indorser is fully secured, and has promised to see to the payment of the paper,⁹¹ there is no reason for the enforcement of the rule requiring presentment and notice in his behalf. As we have already said, one of the principal objects of notice is to enable the indorser to obtain indemnity from the principal, and this has already in such case been attained. But the mere precaution by an indorser of taking security from his principal does not operate as a dispensation of a regular demand and notice.⁹² It has been held that an assignment to the drawer or indorser of all the property of the acceptor or maker as security against liability is sufficient to dispense with presentment and notice.⁹³ But upon principle, and by weight of authority, even this is not enough unless there be an understanding, express or implied, between the parties, that

J. Law, 584, 71 Atl. 280 (N. I. L.); First Nat. Bank v. Sandmeyer, 164 Ill. App. 98 (N. I. L.).

⁹¹ Corney v. Da Costa, 1 Esp. 302; Bond v. Farnham, 5 Mass. 170, 4 Am. Dec. 47; Daniel, Neg. Inst. §§ 1128-1143; Tied. Com. Paper, § 362. Compare Jordan v. Reed, 71 N. J. Law, 584, 71 Atl. 280 (N. I. L.).

⁹² This is true, although the security held by the drawer or indorser has a cash value equal to or greater than the amount of the liability, if fixed. Ray v. Smith, 17 Wall. 411, 21 L. Ed. 666; Creamer v. Perry, 17 Pick. (Mass.) 332, 28 Am. Dec. 297; Denny v. Palmer, 27 N. C. 610; Kramer v. Sandford, 4 Watts & S. (Pa.) 328, 39 Am. Dec. 92; Moody v. Keller, 127 Ala. 630, 29 South. 68, *semble*. *Contra*: Mechanics' Bank v. Griswold, 7 Wend. 165; Watkins v. Crouch, 5 Leigh (Va.) 522. Compare Jordan v. Reed, 77 N. J. Law, 584, 71 Atl. 280 (N. I. L.). It has been said that, where the indorser has discharged the maker of the note from liability by a release and settlement, a notice of non-payment is unnecessary. Burke v. McKay, 43 U. S. (2 How.) 66, 11 L. Ed. 181.

⁹³ Duvall v. Farmers' Bank of Maryland, 9 Gill & J. (Md.) 31; Kimmel v. Weil, 95 Ill. App. 15, 18, *semble*; Spencer v. Harvey, 17 Wend. (N. Y.) 489. But in Moore v. Alexander, 33 Misc. Rep. 613, 68 N. Y. Supp. 888, affirmed 63 App. Div. 100, 71 N. Y. Supp. 420, it was held that allegations that the maker of the note had transferred all of his property to a third person to indemnify the indorser were not sufficient to show that it was unnecessary for the holder to make presentment and give notice of dishonor to this indorser, in the absence of an allegation that the indorser had knowledge of the transfer and accepted it. The court said (33 Misc. Rep. 615, 68 N. Y. Supp. 889): "It may be that an indorser in absolute possession of the maker's property may be assumed to have consented to pay

the drawer or indorser is to be exclusively liable to provide for the payment; and in all cases the proper test is whether the drawer or indorser is bound to take up the paper.⁹⁴

Presentment and notice are also dispensed with when the drawer and drawee are one and the same person,⁹⁵ and consequently when a bill is drawn by a partner on the firm in the firm business,⁹⁶ and when the drawee is a fictitious person.⁹⁷

By Waiver

As in the case of any other conditional promise the promisor may waive compliance with any or all of the conditions, so the drawer or indorser⁹⁸ of a bill or note may

the note himself; but I am referred to no authority * * * that a bare assignment of the maker's property to a trustee to indemnify the indorser, without any agreement whereby he may have recourse to the fund at once upon his payment, would be sufficient to excuse presentment and notice."

⁹⁴ Moses v. Ela, 43 N. H. 557, 82 Am. Dec. 175; Creamer v. Perry, 17 Pick. (Mass.) 332, 28 Am. Dec. 297; Haskell v. Boardman, 8 Allen (Mass.) 38; Wilson v. Senier, 14 Wis. 380; Ray v. Smith, 17 Wall. 416, 21 L. Ed. 666; Hull v. Myers, 90 Ga. 674, 16 S. E. 653.

⁹⁵ As to notice. Bailey v. South Western R. Bank, 11 Fla. 266; Raymond v. Mann, 45 Tex. 301; N. I. L. 114 (subd. 3), 115 (subd. 2). As to presentment, see Bailey v. South Western R. Bank, *supra*; Maux Ferry Gravel Road Co. v. Branegan, 40 Ind. 361. But see Magruder v. Union Bank, 3 Pet. 87, 7 L. Ed. 612. The decision in this case was to the effect that the fact that the indorser of a note took out letters of administration on the estate of the maker, who died before it became due, did not free the holder from the duty of demanding payment, and of giving notice to the indorser. See, also, Gower v. Moore, 25 Me. 16, 43 Am. Dec. 247; Juniata Bank v. Hale, 16 Serg. & R. (Pa.) 167, 16 Am. Dec. 558. In this case the maker of the note was shown to have died before it became due. Letters of administration upon the estate were taken out by the indorsers, among others, before maturity of the note. It was held that, notwithstanding these facts, notice of the maker's non-payment must be given to the indorsers.

⁹⁶ Porthouse v. Parker, 1 Camp. 82; Gowan v. Jackson, 20 Johns. (N. Y.) 176; Rhett v. Poe, 2 How. 457, 11 L. Ed. 338. See Hill v. Planters' Bank, 3 Humph. (Tenn.) 670; Shaw v. Stone, 55 Mass. (1 Cush.) 228; Daniel, Neg. Inst. § 1086.

⁹⁷ Smith v. Bellamy, 2 Starkie, 223; Chalm. Bills Exch. (4th Ed.) 150. See N. I. L. §§ 82, 114 (subd. 1), 115 (subd. 1), 148 (subd. 1).

⁹⁸ The waiver may, of course, be by an agent. And a waiver by the maker of a note in pursuance of an authority given to him by

waive due diligence to make presentment and to give notice of dishonor.⁹⁹ Such a waiver consists of an expression of intention to excuse the failure to comply with such conditions.¹ This expression of intention² may be by means

the indorser is effectual against such indorser, since the maker has no interest adverse to that of the indorser. *Re Buzzini & Co.* (D. C.) 183 Fed. 827.

⁹⁹ Expressions showing an intention to excuse failure to make presentment should be distinguished from expressions of intention indicating what is a reasonable time for presentment. Evidence of the former are not admissible under an allegation of due presentment and notice. *Bayless v. Harris*, 124 Mo. App. 234, 101 S. W. 617; *Congress Brewing Co. v. Habenicht*, 83 App. Div. 141, 82 N. Y. Supp. 481 (N. I. L.).

¹ It has been said that this expression of intention must be intentionally communicated by the drawer, indorser, or his agent to the holder, in order that it constitute a waiver. *First Nat. Bank of City of Brooklyn v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.). In that case it was taken as proved that the defendant was one of the joint payee indorsers of a note; that several days before the maturity of that note the defendant made out a note payable to the same payees jointly, indorsed it, and mailed it to the maker; that the maker erased the name of one of the payees, inserted his own, indorsed the note, and then procured the endorsements of the other two payees; that several days after the maturity of the original note the maker took the new note to the plaintiff bank, the holder of the first note, discounted the new note, and with the proceeds and other funds took up the first note and canceled it in the presence of the officer of the plaintiff; that no notice of the dishonor of the first note was given to the defendant. This was an action by the bank as holder against the defendant as indorser of the first note. The

² It seems that, whether the alleged waiver take place before or after the failure to comply with a condition, only the expressed or manifested intention of the drawer or indorser is material in determining whether or not there has been a waiver. But see *Toole v. Crafts*, 196 Mass. 397, 82 N. E. 22 (N. I. L.). In that case there was evidence that the holder and indorser of the demand note in question, at the time of the signing of the alleged waiver, which was after there had been a failure to present the instrument within a reasonable time, had in mind a protest of the note in the future, and that the words "waiving demand, notice, and protest" were, when written by the indorser, intended by him to refer only to such suggested future protest. The trial court instructed the jury that, if they believed that the indorser intended to refer to the future and not to the past, they should find for the defendant. It was held that this instruction was not erroneous.

of words, written or spoken,³ by means of words and acts, or by means of acts alone,⁴ and may be before or after the

trial court had held (1) that, as a matter of law, the transaction at the bank did not amount to a payment of the note in suit, and (2) that the defendant was still liable to pay the amount of the note in spite of the failure to give her notice of dishonor. It was held that the trial court erred. The court points out that there was error in the first conclusion, and might well have reversed the judgment on that ground. But the court proceeds to decide that the second conclusion of the trial court was wrong for two reasons: (1) That there was no evidence that the plaintiff had knowledge of the indorsement of the renewal note by the defendant before the day, after the maturity of the original note, when the original note was taken up by the maker, or that the plaintiff was induced by any act of the defendant to omit the notice; (2) that the indorsement of the renewal note by the defendant was not to be effective according to her expressed intent before the other payees named in the note had indorsed; that all of these payees did not indorse, but the indorsement of a substituted payee appeared; that the expression of intention conveyed by the note thus altered and indorsed was not an expression made by the defendant. This case, therefore, should not be received as deciding that indorsing a note for renewal, before the maturity of the original note, does not constitute a waiver, where such renewal note does not come to the knowledge of the holder of the original note before or at maturity, but comes to his knowledge several days after he has failed to make presentment and to give notice of dishonor. Nor should the case be received as deciding that the expression of intention to excuse must, to constitute a waiver, be intentionally communicated to the holder. The court, however, said (112 App. Div. 405, 98 N. Y. Supp. 450, 451): "Research of counsel, supplemented by our own, has failed to disclose a single case in which it has been held that a waiver could be implied from some act of an indorser not known to the holder before maturity of the note." See Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669. But see Yeager v. Farwell, 13 Wall. 6, 20 L. Ed. 476. See, also, Daniel, Neg. Inst. (5th Ed.) §§ 1109, 1110; 1 Parsons, Notes & Bills, 610.

³ This expression of intention need not be in writing. Phipson v. Kneller, 4 Camp. 285; Lane v. Stewart, 20 Me. 98; Smith v. Lownsdale, 6 Or. 78. But where the expression of intention is contemporaneous with the drawing or indorsing, it is inconsistent with the other terms of the written contract then made. For this reason parol evidence of such an expression of intention at the time of indorsement, at least in the case of a regular full indorsement, is not, on principle, admissible. Free v. Hawkins, Holt, N. P. 550; Barry v. Morse, 3 N. H. 132; Bowers v. Headen, 4 Ind. 318. See Brown

* See note 4 on following page.

failure to comply with the condition in question.⁵ The commonest forms of express waiver are the words, "Pres-

v. Crofton (Ky.) 76 S. W. 372. Contra: Boyd v. Cleveland, 4 Pick. (Mass.) 525; Fullerton v. Rundlett, 27 Me. 31; Daniel, Neg. Inst. (5th Ed.) § 1093. See Annville Nat. Bank v. Kettering, 106 Pa. 531, 51 Am. Rep. 536; President, etc., of City Bank v. Cutter, 3 Pick. (Mass.) 414; Bryden v. Cairncross, 145 Wis. 478, 130 N. W. 527 (N. I. L.); Wigmore, Ev. § 2445. Compare Pollard v. Bowen, 57 Ind. 232, 236, 237; Hayes v. Werner, 45 Conn. 246; Hampton v. Miller, 78 Conn. 267, 61 Atl. 952; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427 (N. I. L.). But see 1 Parsons, Notes & Bills, 584. It has been held that the opposite conclusion should be reached as to blank indorsements (Kimbrow v. Lamb, 4 Humph. [Tenn.] 95, 40 Am. Dec. 628; Dye v. Scott, 35 Ohio St. 194, 35 Am. Rep. 604; 2 Ames Cas. Bills & Notes, 814, 815), on the theory, it seems, that a blank indorsement is not a completed contract, and may be completed in any terms in pursuance of a parol authority (2 Ames Cas. Bills & Notes, 804; Kimbro v. Lamb, *supra*). But there is both reason and authority for applying to regular blank indorsements the same rule as to regular full indorsements. Farwell v. St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; Goldman v. Davis, 23 Cal. 256; Bank of Albion v. Smith, 27 Barb. (N. Y.) 489; Kimmel v. Weil, 95 Ill. App. 15; TORBERT v. MONTAGUE, 38 Colo. 325, 87 Pac. 1145 (N. I. L.), Moore Cases Bills and Notes, 253; Porter v. Moles, 151 Iowa, 279, 131 N. W. 23 (N. I. L.). The terms of the promise of an irregular indorser, since his promise is not expressed by a signing which, with delivery, also effects a transfer of title, are not fixed by the law merchant, and thus parol evidence is, in such case, admissible to show a contemporaneous oral expression of intention not to require presentment and notice. This result has been reached even under the N. I. L. Baumeister v. Kuntz, 53 Fla. 340, 42 South. 886 (N. I. L.). But in that case the court rested its conclusion upon the ground that evidence of a contemporaneous waiver was not evidence of a variation in the terms of a written contract. See note 99, p. 565, *supra*.

⁴ When the expression is in writing, it is interpreted by the court. Thus it has been held that an indorsement by the payee, which recites, "For value received I hereby guarantee the payment of the within note and assign my interest in it," expresses an intention to dispense with presentment and notice of dishonor. Allen v. Burgen, 156 Mo. App. 265, 137 S. W. 616. See Hibernia Bank & Trust Co. v. Dresser, 132 La. 532, 67 South. 561 (N. I. L.). Where, however, the expression of intention is oral or by acts, the meaning of the expression is a fact ordinarily to be found by the jury. TORBERT v. MONTAGUE, 38 Colo. 325, 87 Pac. 1145 (N. I. L.), Moore

⁵ See note 5 on page 571.

entation and protest waived," or "Notices and protest of non-acceptance waived," or words similar in import, writ-

Cases Bills and Notes, 253; *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23; *Churchill v. Yeatman Gray Grocer Co.* (Ark.) 164 S. W. 283. Thus, where it was stipulated that the defendant indorser was a partner in the maker firm, and before maturity had a conference with the holder, in which the defendant stated the desirability of an assignment by the insolvent maker firm for the benefit of creditors, and that neither the firm nor he could pay the note at maturity, and where by the same stipulation inferences of fact were to be drawn by the referee, a finding by the referee that presentment was waived, and that notice of dishonor, if not waived, was unnecessary, was affirmed. *Re Swift* (D. C.) 106 Fed. 65. So, in the case of an expression of intention alleged to constitute a waiver after maturity, a finding by the trial court (which found the facts) that the signing by the defendant indorser of a duplicate check, with the intention of furnishing evidence of the original check, which had been lost, did not show a waiver of presentment and notice of dishonor, was affirmed. *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925 (N. I. L.). So payments of interest by the indorser on the note after failure to present and give notice do not necessarily show an intention to excuse the failure to comply with these conditions. *Porter v. Thom*, 187 N. Y. 584, 60 N. E. 1119. It is, of course, possible that the acts and words may, under all the circumstances, be so expressive of an intention to excuse the failure to comply with a condition that a contrary finding of fact will be reversed. Thus, where the undisputed evidence shows that the plaintiff refrained from presenting the note at the request of the defendant indorser, any other conclusion than that presentment was waived will not be affirmed. *Hoffman v. Hollingsworth*, 10 Ind. App. 353, 37 N. E. 960. So where the undisputed evidence showed that the defendant indorsed before delivery a note, payable one day after date, made by the corporation of which he was a stockholder and secretary, which note was to be paid out of the net proceeds of lumber which was to be sawed by the corporation, and that none of the parties expected that the note would be presented at maturity, it was held that these circumstances showed a waiver of presentment and notice of dishonor. *Baumeister v. Kuntz*, 53 Fla. 340, 42 South. 889 (N. I. L.). So an agreement by an indorser, before the maturity of the note, that the time for payment be extended is held, in the absence of other material circumstances, to conclusively show an intention to excuse a failure to present and give notice. In *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669, the evidence tended to show that the indorsee of a note, who was negotiating with the plaintiff as to a transfer of the note to the plaintiff, a few days before the maturity of the note went to the defendant indorser and told him that the maker of the note

ten or printed on the face of the bill, or over some or all of the indorsements, or else on a separate piece of paper.⁶

"wanted this note to remain another year," to which the defendant replied that he was "willing to let it remain." The plaintiff received the note, indorsed to him, before maturity. He did not present the note at its due date, but waited about a year before so doing. The trial court instructed the jury that, if they believed that the above conversation took place, they must find for the plaintiff. It was held, on the assumption that the plaintiff knew of this inquiry and that the defendant made the statement with the intention that it should be communicated to the plaintiff, that there was no error. So an oral agreement to indorse a renewal note, made before the maturity of the original note, has been held to conclusively show an intention to excuse presentment and notice, in the absence of other circumstances tending to show an absence of such an intention. In *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557, the evidence tended to show that before the maturity of the note, which he had indorsed, the defendant went to the plaintiff holder and asked him if he would extend the note for another year if the interest should be paid up; that the plaintiff said that he was willing, if the defendant would let his name continue on it; that the defendant so agreed. The trial court instructed the jury that, if they believed this evidence, they must find for the plaintiff. Judgment on a verdict for the plaintiff was affirmed. Accord: *Sweetser v. Jordan*, 211 Mass. 393, 97 N. E. 768; *Sweetser v. Jordan*, 216 Mass. 350, 103 N. E. 905 (N. I. L.); *Leary v. Miller*, 61 N. Y. 488, sensible; *First Nat. Bank of Friendship v. Weston*, 25 App. Div. 414, 49 N. Y. Supp. 542. In the case last cited, however, the point actually decided was that the indorsement by the defendant of a renewal note before the maturity of the original note which he had indorsed, the coming to the hand of the holder of the original note of such renewal note, thus indorsed, before the maturity of the original note, and the subsequent omission of presentment and notice of dishonor of the original note were facts sufficient to sustain a finding of fact that the defendant had expressed to the plaintiff an intention to excuse presentment and notice. In *Bessenger v. Wenzel*, 161 Mich. 61, 125 N. W. 750, 27 L. R. A. (N. S.) 516 (N. I. L.), the evidence tended to show that the defendant indorser was a director of the maker corporation; that he knew that the corporation could not pay the note at maturity; that he told the plaintiff payee that the

⁶ *Spencer v. Harvey*, 17 Wend. (N. Y.) 489. Where this separate writing is executed contemporaneously with the drawing or indorsing, it should not, it seems, be held to constitute a waiver of presentment and notice of dishonor, since to so hold would permit the variation of a specialty by a simple written agreement. See note, p. 109 et seq., Chapter II, supra.

Where it is written on the face of the bill or note, it applies to all the parties.⁷ Where it is written over some or all the

note could not be paid; and that he, with the other indorsers, had promised that he would indorse a renewal note. The evidence was conflicting as to every claim of the plaintiff, except that at maturity there were no funds in the bank where the note was payable with which to meet it. The trial court charged the jury: "(1) If there was no money in the bank with which to pay the note, and the holder, maker, and indorsers knew that fact, presentment for payment was not necessary. (2) If the holder, maker, and indorsers agreed before or at maturity that the note should not be paid, but renewed, then there was no necessity of presenting it for payment. * * *" A judgment for the plaintiff upon a verdict in his favor was affirmed, the court expressly approving the instructions. This decision seems, on the basis of the printed report, erroneous, since knowledge by all the interested parties that the note will not be paid does not constitute a waiver of presentment or notice. Re Fenwick, [1902] 1 Ch. 507. See First Nat. Bank of City of Brooklyn v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445 (N. I. L.). For the same reason the decision in J. W. O'Bannon Co. v. Curran, 129 App. Div. 90, 113 N. Y. Supp. 359 (N. I. L.), seems erroneous. See p. 565, supra. In Worley v. Johnson, 60 Fla. 294, 53 South. 543, 33 L. R. A. (N. S.) 639, an action by the holder against the indorser of a note, the complaint, in lieu of an allegation of presentment and notice, alleged that shortly before the maturity of the note the makers denied to the plaintiff holder all liability on the instrument and stated that they would not pay it; that the plaintiff then told the defendant of these statements; that the defendant then said that he knew he was liable, that he did not have the money to pay the same, but that if the plaintiffs should sue the makers, and fail to make the money out of them, he would pay; that in reliance upon these statements the plaintiff omitted presentment and notice of dishonor. A judgment upon an order overruling a demurrer to this complaint was reversed upon the ground that the statements and other circumstances alleged were not inconsistent with an intention on the part of the defendant to insist upon presentment and notice of dishonor. Whether or not the evidence is sufficient to sustain as reasonable a conclusion of fact that the indorser expressed an intention to excuse presentment or notice of dishonor is, of course, always a question for the court. Thus, in Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481 (N. I. L.), it was

⁷ Bryant v. Merchants' Bank of Kentucky, 8 Bush (Ky.) 43; Farmers' Bank of Kentucky v. Ewing, 78 Ky. 266, 39 Am. Rep. 231; Lowry v. Steele, 27 Ind. 170; Bryant v. Lord, 19 Minn. 397 (GIL 342); Jacobs v. Gibson, 77 Mo. App. 244; Owensboro Sav. Bank & Trust Co.'s Receiver v. Haynes, 143 Ky. 534, 136 S. W. 1004 (N. I. L.).

indorsements, it applies only to those indorsements over which it is written.⁸ An express statement, purporting to

held that a statement before maturity, to the holder, by the indorser, that he would see the maker and, if the maker did not make his account (with the holder) good, he would "go and shut him up," was not sufficient evidence to sustain a finding of the facts necessary to a waiver. See *Mechanics' & Farmers' Sav. Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439.

⁸ It is well established that presentment or notice of dishonor, or both, may be waived after as well as before the failure to effect one or both. See cases collected in 2 Ames Cas. Bills & Notes, 504, 505. Contra: *Lawrence v. Ralston*, 6 Ky. (3 Bibb) 102; *Donnelly v. Howie, Haynes & Jones*, 436, 2 Ames Cas. Bills & Notes, 501. The necessary element of a waiver after failure to comply is the same as that of a waiver before such failure; i. e., an expression of intention to excuse such failure. Thus it is well settled that a promise to pay the note or bill, made after and with knowledge of such failure, although made without consideration and although within the statute of frauds, is a waiver of such failure. See cases cited in 2 Ames Cas. Bills & Notes, 505; *Richardson v. Kulp*, 81 N. J. Law, 123, 78 Atl. 1062 (N. I. L.); *Burns v. Yocom*, 81 Ark. 127, 98 S. W. 956. But a promise made by an indorser jointly with three other persons to pay the note, and the subsequent acknowledgment of such joint liability, does not clearly show an intention to excuse a failure to make presentment and give notice, and so is not necessarily a waiver. *Jordan v. Reed*, 77 N. J. Law, 584, 71 Atl. 280 (N. I. L.). Any act other than an express promise to pay, done after the failure to comply with such conditions, showing an intention to pay the amount of the instrument, and done with knowledge that such conditions have not been complied with, clearly shows an intention to excuse the non-compliance, and thus constitutes a waiver. Accordingly, where the indorser of a check, after dishonor, gave his own check in return for the dishonored instrument, with knowledge of the delay in giving him notice of dishonor, he waived such delay. *Well v. Corn Exch. Bank*, 63 Misc. Rep. 300, 116 N. Y. Supp. 665, affirmed 135 App. Div. 915, 119 N. Y. Supp. 1149 (N. I. L.). Compare *Porter v. Thom*, 167 N. Y. 584, 60 N. E. 1119. See *Murphy v. Levy*, 23 Misc. Rep. 147, 50 N. Y. Supp. 682. The expression of intention need not, however, be by means of an expression of intention to pay the bill or note. Thus, where the indorser, after the failure to comply with these conditions, writes upon the note "Waiving demand, notice and protest," this, in the absence of circumstances showing some other intention, constitutes a waiver. *Burgettstown*

⁸ *Woodman v. Thurston*, 8 CUSH. (Mass.) 157; *President, etc., of Central Bank v. Davis*, 19 Pick. (Mass.) 373. *Parshley v. Heath*, 69 Me. 90, 31 Am. Rep. 246, contra.

excuse non-compliance with one condition does not necessarily show an intention to excuse the failure to comply

Nat. Bank v. Nill, 213 Pa. 456, 63 Atl. 186, 3 L. R. A. (N. S.) 1079, 110 Am. St. Rep. 554, 5 Ann. Cas. 476 (N. I. L.); Toole v. Crafts, 196 Mass. 397, 82 N. E. 22 (N. I. L.), *semble*. Where, however, the expression of intention, thus made after the failure to comply is made under a mistaken impression that the acts essential to presentment and notice had been done, it does not constitute a waiver. Thus a promise to pay the instrument, made without knowledge of the failure to present and give notice, does not necessarily constitute a waiver. Hamilton v. Winona Salt & Lumber Co., 95 Mich. 436, 54 N. W. 903; Nevius v. Moore, 221 Mo. 330, 120 S. W. 43. But an expression of intention, otherwise sufficient, constitutes a waiver, although made because of ignorance of the legal effect of the omission. Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455 (N. I. L.), *semble*. Evidence of such ignorance is, however, admissible to show that in making such expression of intention the indorser relied upon the fraudulent misrepresentations of the plaintiff or his agent. Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455 (N. I. L.). The expression of intention to excuse non-compliance may be such, and may be made under such circumstances, that whether or not the drawer or indorser knows the facts as to non-compliance is immaterial. In Yeager v. Farwell, 13 Wall. 6, 20 L. Ed. 476, the uncontradicted evidence showed that on the last day of grace the defendant indorsers mailed, at St. Louis, Mo., a letter written on that day, addressed to the holder at Boston, Mass., containing a statement that the maker of the note could not pay it for several days, but that they held themselves responsible for the payment of the note and would see that it was paid at an early day. The note was not presented for payment, nor notice of dishonor given. The trial court, taking the question from the jury, held that this evidence clearly showed a waiver. Judgment for the plaintiff holder was affirmed. Under the circumstances the expression of intention could not possibly have been communicated to the plaintiff before the failure to make presentment and give notice of dishonor. As a waiver after maturity, it was made without knowledge of the failure to comply. But the words under the circumstances expressed an intention to excuse failure to comply, whether or not such failure had occurred or should occur. Compare note 5, *supra*. But, although the fact essential to a waiver after a failure to comply is thus the same as that essential to a waiver before such failure, acts done after such failure may not so clearly, or may not at all, express the same intention as similar acts done before such failure. Thus evidence of a verbal promise made after maturity, by an accommodation indorser, to sign a renewal note, has been held not sufficient to support a finding by a jury of the facts essential to a waiver, although there was other

with another condition.⁹ Sometimes notice alone is waived;¹⁰ sometimes presentment; sometimes protest. The word "protest," however, is now construed, at least in a written waiver, as including dishonor and notice of dishonor, unless expressly limited to its accurate meaning.¹¹

evidence tending to show a knowledge on the part of such indorser at the time of such promise of the failure to give notice of dishonor. *Mechanics' & Farmers' Sav. Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439 (N. I. L.). Compare *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669 (see statement of this case in note 4, *supra*). See *Barker v. Parker*, 23 Mass. (6 Pick.) 80.

⁹ Thus a written waiver of due notice of dishonor does not dispense with presentment. *Keith v. Burke*, 1 Cababe & Ellis, 551; *Hayward v. Empire State Sugar Co.*, 105 App. Div. 21, 93 N. Y. Supp. 449 (N. I. L.); *Hall v. Crane*, 213 Mass. 326, 103 N. E. 554 (N. I. L.) Contra: *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604; *Baumeister v. Kuntz*, 53 Fla. 340, 42 South. 886, *semble*.

¹⁰ *Backus v. Shipherd*, 11 Wend. (N. Y.) 629; *President, etc., of Berkshire Bank v. Jones*, 6 Mass. 524, 4 Am. Dec. 175; *Burnham v. Webster*, 17 Me. 50.

¹¹ *Coddington v. Davis*, 1 N. Y. 186; *Porter v. Kemball*, 53 Barb. (N. Y.) 467; *Shaw v. McNeill*, 95 N. C. 535; *Brown v. Hull*, 33 Grat. (Va.) 23; N. I. L. § 111; *Bank of Montpelier v. Montpelier Lumber Co.*, 16 Idaho, 730, 102 Pac. 685 (N. I. L.); *Atkinson v. Skidmore*, 152 Ky. 413, 153 S. W. 456 (N. I. L.). Where the expression of intention is oral, the interpretation of the word "protest" is, it seems, for the jury. See *Annville Nat. Bank v. Kettering*, 106 Pa. 531, 51 Am. Rep. 536.

CHAPTER X

CHECKS.

- 149. **Definition.**
- 150. **Presentment and Notice of Dishonor—Effect of Delay.**
- 151–152. **Rights of Holder against Bank.**
- 153–155. **Certification and Acceptance of Checks.**
- 156. **Failure of Bank to Honor Check.**

DEFINITION

- 149. A check is a bill of exchange drawn on a bank payable on demand.¹**

The following is the ordinary form of a check:

Chicago, Ill., Aug. 1st, 1895.

First National Bank of Chicago, Ill.

Pay to Adam Smith or order [or to Adam Smith simply, or to Adam Smith or bearer, or simply to bearer]

Five hundred and $\frac{50}{100}$Dollars
\$500 $\frac{50}{100}$ John Jones.

John Jones is the drawer; the First National Bank of Chicago, Ill., is the drawee; Adam Smith is the payee; and the payee, while he holds the check, or any person who holds it by transfer from him, is called the "holder."

The Negotiable Instruments Law defines a check as a "bill of exchange drawn on a bank payable on demand."²

¹ N. I. L. § 185.

² N. I. L. § 185, provides: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." This section is substantially the same as section 73 of the English Bills of Exchange Act, and like that section is declaratory of the pre-existing law merchant. *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95, per Lord Blackburn; *People v. Kemp*, 76 Mich. 410, 48 N. W. 439. See *Wisner v. First Nat. Bank of Gallitzin*, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266 (N. I. L.); *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182 (N. I. L.); *Chalmers, Bills of Exchange* (7th Ed.) 273. A check is not necessarily an inland bill of exchange. Where a foreign

To be a check, the order must be drawn on a bank or banker.³ If drawn on any other person, it is a bill of exchange, but not a check. It need not, however, appear on the face of the check that the drawee is a banker. It is essential that a check shall be payable on demand; so that if an instrument, though otherwise in the form of a check, and drawn on a bank, orders payment on a day subsequent to its date, it is not a check, but a bill of exchange payable on a certain day, and is subject to all the rules governing such bills of exchange—the rule, for instance, allowing days of grace.⁴

bill is drawn on a bank and payable on demand, it is a check, and therefore subject to the rules, applicable to checks, determining the effect upon recourse against the drawer of a failure to present, protest, and give notice of dishonor. *Bowen v. Needles Nat. Bank* (C. C.) 87 Fed. 430, affirmed 94 Fed. 925, 36 C. C. A. 553. See *Mankey v. Hoyt*, 27 S. D. 561, 132 N. W. 230; *Amsinck v. Rogers*, 103 App. Div. 428, 93 N. Y. Supp. 87 (N. I. L.), affirmed 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450; *Dickins v. Beal*, 10 Pet. 572, 579, 9 L. Ed. 538; *Bank of United States v. Daniel*, 12 Pet. 32, 52, 9 L. Ed. 989; *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425.

³ In *Industrial Bank of Chicago v. Bowes*, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228, it was held that in order that a bill be a check, it is not essential that the drawee be engaged in a general banking business. In that case the drawer had borrowed from the drawee, P. H. & Co., a sum which was to be paid out by the drawee upon the orders of the drawer; and the drawer indorsed upon an architect's certificate, which stated a certain amount to be due to a certain contractor: "P. H. & Co.: Pay to the order of E." It was held that, in the absence of damage resulting to him therefrom, the drawer was not discharged by a failure to make presentment or to give him notice of dishonor.

⁴ *Bowen v. Newell*, 8 N. Y. 190; *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; *Morrison v. Bailey*, 5 Ohio St. 13, 64 Am. Dec. 632; *Woodruff v. Merchants' Bank of City of New York*, 25 Wend. (N. Y.) 673; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Minturn v. Fisher*, 4 Cal. 36; *Brown v. Lusk*, 4 Yerg. (Tenn.) 210; *Georgia Nat. Bank v. Henderson*, 46 Ga. 487, 12 Am. Rep. 590; *Bradley v. Delaplaine*, 5 Har. (Del.) 305; *Harrison v. Nicollet Nat. Bank of Minneapolis*, 41 Minn. 488, 43 N. W. 336, 5 L. R. A. 746, 16 Am. St. Rep. 718. Contra: *Re Brown*, 2 Story, 502, Fed. Cas. No. 1,985; *Champion v. Gordon*, 70 Pa. 475, 10 Am. Rep. 681; *Westminster Bank v. Wheaton*, 4 R. I. 30; *Way v. Towle*, 155 Mass. 374, 29 N. E. 506,

Memorandum Checks

It is necessary to notice shortly a class of checks of a peculiar character, known as "memorandum checks." In form and appearance a memorandum check does not differ from ordinary checks, except that on the face of them is written the word "memorandum," or "mem.," or "memo." Such a check "is given by the maker to the payee rather as a memorandum of indebtedness than as a payment. Between those parties it is considered as a duebill, or an I O U. It can be sued upon as a promissory note, without presentation to the bank, whereas the holder of a regular check must first demand its payment at bank, and be refused, before he can maintain an action against the drawer."⁵ The fact that the word "memorandum," or "mem.," or "memo.," is written on a check, makes it a memorandum check. The bank, however, is not bound to pay any attention to these words, or to recognize any contract as implied between the maker and payee which gives the check any peculiar character. If such a check is presented for payment, and the drawer has sufficient funds to meet it, the bank must honor

31 Am. St. Rep. 552. See Daniel, Neg. Inst. §§ 1573-1575. It seems that a post-dated bill, drawn on a bank and otherwise purporting to be payable on demand, is not a check, but a bill of exchange payable on a certain designated day. Wilson v. McEachern, 9 Ga. App. 584, 71 S. E. 946. See Chalmers, Bills of Exchange (7th Ed.) 37. Compare Hitchcock v. Edwards, 60 L. T. Rep. 636; Royal Bank v. Tottenham, [1894] 2 Q. B. 715. But see Daniel, Neg. Inst. (5th Ed.) § 1578, and cases cited. See Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. Supp. 87 (N. I. L.), affirmed 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450, where it was held that, although the instrument recited on its face that it was a check, since it was not drawn on a bank, it was subject to the rules as to the effect of failure to protest the instrument, applicable to other bills of exchange. See, also, Symonds v. Riley, 188 Mass. 470, 74 N. E. 926. An indorsee holder of a post-dated check, becoming such before the date named in the instrument, is not, by such post-dating, precluded from being a holder in due course. The instrument is complete and regular upon its face. Albert v. Hoffman, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043 (N. I. L.); Hitchcock v. Edwards, 60 L. T. R. 636. See N. I. L. §§ 12, 52; B. E. A. §§ 13 (subd. 2), 29 (subd. 1); Triphonoff v. Sweeney, 65 Or. 299, 130 Pac. 979 (N. I. L.).

⁵ Van Schaack, Bank Checks, 184.

it like any ordinary check. If the agreement between the maker and payee is that it shall not be presented for payment, any remedy of the drawer for the breach of such agreement is solely against the payee.⁶

A memorandum check presents all the features of other negotiable instruments when transferred or indorsed to a bona fide holder for value.⁷ "A memorandum check is a contract by which the maker engages to pay the bona fide holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and nonpayment should be given."⁸

PRESENTMENT AND NOTICE OF DISHONOR— EFFECT OF DELAY

150. The drawer of a check is not discharged from his obligation by unreasonable delay in presentment of the check for payment, or in giving him notice of dishonor, in case of presentment and dishonor, unless he has been actually prejudiced thereby; but if he has suffered a loss thereby, as by failure of the bank, he is discharged to the extent of his loss.

It seems that the failure to make due presentment of a demand bill of exchange other than a check for payment will discharge the drawer.⁹ Checks, however, in this respect, stand on a different footing. In no case will delay in presentment discharge the drawer of a check¹⁰ unless

⁶ Morse, Banks, 313.

⁷ Van Schaack, Bank Checks, 185.

⁸ Franklin Bank v. Freeman, 16 Pick. (Mass.) 535. See, also, as to this class of checks, Cushing v. Gore, 15 Mass. 69; Dykers v. Leather Mfgs. Bank, 11 Paige (N. Y.) 612.

⁹ See Thornburg v. Emmons, 23 W. Va. 325, 334, and authorities cited. This conclusion is unavoidable under the Negotiable Instruments Law. N. I. L. §§ 89, 185, 186. See Gate City Nat. Bank v. Schmidt, 168 Mo. App. 153, 152 S. W. 101 (N. I. L.).

¹⁰ Indorsers stand on a different footing from the drawer; and, as in the case of bills of exchange, unless presentment be made, and

he is prejudiced thereby.¹¹ When a man gives a check, he should see that he does not withdraw the money that is

notice given, within a reasonable time, they are discharged. *Merchants' Bank v. Spicer*, 6 Wend. (N. Y.) 445; *Murray v. Judah*, 6 Cow. (N. Y.) 490; *Daniel, Neg. Inst.* § 1587. See *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1180, 22 L. R. A. 785; N. I. L. §§ 89, 185, 186; *American Nat. Bank v. National Fertilizer Co.*, 125 Tenn. 328, 143 S. W. 597 (N. I. L.).

¹¹ *Serie v. Norton*, 2 Moody & R. 401, *Robinson v. Hawksford*, 9 Q. B. 52, and *MORRISON v. McCARTNEY*, 30 Mo. 183, *Moore Cases Bills and Notes*, 255, among many other cases, sustain this proposition. In *Serie v. Norton*, a check dated March 19th was not presented until April 6th, when payment was refused. The holder sued the drawer, and the latter pleaded delay on presentment. No excuse for the delay was shown but it did not appear that the bank had failed, or that the defendant was otherwise prejudiced. The plaintiff had a verdict. See *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425; *Id.*, 7 Hill (N. Y.) 359; *Hoyt v. Seeley*, 18 Conn. 353; *Pack v. Thomas*, 13 Smedes & M. (Miss.) 11, 51 Am. Dec. 135; *Purcell v. Allemong*, 22 Grat. (Va.) 739; *Howes v. Austin*, 35 Ill. 396; *Heartz v. Rhodes*, 66 Ill. 351; *Stevens v. Park*, 73 Ill. 387; *Henshaw v. Root*, 60 Ind. 220; *Stewart v. Smith*, 17 Ohio St. 82; *Kinyon v. Stanton*, 44 Wis. 479, 28 Am. Rep. 601; N. I. L. § 186. The holder of a check, in order to recover against the drawer, if he does not prove presentment and notice of dishonor, must prove that these steps have been dispensed with, that they have been taken, or that the failure to perform them has not resulted in any loss to the drawer. In other words, in an action upon the check by the holder against the drawer, the burden of showing the absence of such loss is upon the plaintiff holder. Thus a complaint by a holder against a drawer of a check, which fails to allege presentment and notice of dishonor, facts dispensing with such presentment or notice, or the absence of loss resulting from the omission of those steps, is demurrable. See cases cited in note 15, infra. But see *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 27 S. E. 979, 38 L. R. A. 749. So where all the evidence is before the court, and it contains no evidence of presentment or notice of dishonor, or of circumstances dispensing with presentment or notice of dishonor, or of the absence of loss by reason of the failure to perform those acts, a judgment for the plaintiff holder against the defendant drawer of the check will be reversed. *Proctor v. Einstein*, 20 Ill. App. 664. Accord: *Ford v. McClung*, 5 W. Va. 156; *Nelson v. Kastle*, 105 Mo. App. 187, 79 S. W. 730; *Hamlin v. Simpson*, 105 Iowa, 125, 74 N. W. 906, 44 L. R. A. 397, semble. Compare *Fritz v. Kennedy*, 119 Iowa, 628, 93 N. W. 603; *Watt v. Gans*, 114 Ala. 264, 21 South. 1011, 62 Am. St. Rep. 99. See cases cited in note 15, infra. Where, however, the action is based upon an obligation other than the check, and the defendant drawer

there to meet it. Allowing the money to remain there cannot prejudice him. If the delay is unreasonable,¹² and the drawer is prejudiced thereby, he will be discharged from

pleads payment, the burden of establishing this affirmative defense is upon him, and to establish payment by check he must show either that a check was given and received in absolute payment, or that, by reason of the failure to present and give notice, resulting in his prejudice, he is not in default upon the check given in conditional payment. *Long v. Eckert*, 73 Mo. App. 445; *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (N. I. L.). See *Fritz v. Kennedy*, 119 Iowa, 628, 93 N. W. 603. Compare *Kirkpatrick v. Puryear*, 93 Tenn. 410, 24 S. W. 1130, 22 L. R. A. 785. Some difficulty arises in determining when the drawer has been prejudiced, within the meaning of the rule as stated in the text, by the failure to make presentment or to give notice of dishonor. In *Andrus v. Bailey* (C. C.) 102 Fed. 54, the defendant drawer gave a check to the payee, who indorsed it to the plaintiff with a request that the plaintiff refrain from at once presenting it for payment. Several weeks later, and after this check would have been presented, had the plaintiff presented it for payment within a reasonable time, the drawer, upon the return of canceled checks by the drawee bank to him, noticed that this check had not been presented. Some weeks thereafter the payee represented to the drawer that the check had been mislaid. The drawer then paid the amount of the check to the payee, after the payee had signed a written agreement to return the check when found. Several months later the drawer notified the bank not to pay the check if it should be presented. It was thereafter presented for payment, and payment refused. A verdict was taken for the plaintiff, by agreement, subject to the entry of judgment for the defendant non obstante veredito if the court should be of the opinion that these facts showed a valid defense. It was held that these facts did not show a valid defense. The court said: "Now, it may be—I think it must be—conceded that the plaintiff's retention of this check for about 11 months without presenting it would have been at his own risk, if the institution upon which it was drawn had failed in the meantime. But the authorities which determine this are inapplicable to the present case. The banker upon whom the check was drawn was solvent when it was presented. But for the defendant's notice, it certainly would have been paid, and the giving of that notice, as against a bona fide purchaser for value, was not warranted. Such a holder is under no obligation to the drawer to present a check within a reasonable time, and [the drawer] is not prejudiced by delay in doing so, except where the fund has been lost by failure of the bank"

¹² As to what is an unreasonable delay in presenting a check for payment, see p. 501 et seq., supra. As to the standard in the case of substituted checks, see p. 594, infra.

his obligation, both on the check and on the original consideration, to the extent of his loss, but only to that extent.¹⁸ Thus, if the holder of a check fails to present it within a reasonable time, and the bank becomes insolvent, so that the drawer loses the whole amount of the check which he had on deposit to meet it, the loss will fall on the holder, and the drawer will be entirely discharged. It would be unreasonable to permit the holder to allow the money to remain in the bank indefinitely at the risk of the drawer, who has no means of protecting himself. If the bank should pay the drawer 50 cents on the dollar, so that he would only lose half the amount of the check, he would only be discharged as to the other half. If he had no money at all in the bank, though the bank might have honored his check, he would not be discharged at all. In all cases there must be both unreasonable delay and prejudice. "When a loss has occurred by the check not being presented, it is neces-

—citing *Flemming v. Denny*, 2 Phila. (Pa.) 111; *MERCHANTS' NAT. BANK v. STATE NAT. BANK*, 10 Wall. 647, 19 L. Ed. 1008; *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97. The correctness of this conclusion may well be doubted. The decisions of the United States Supreme Court cited for this proposition do not sustain it. In *Heralds of Liberty v. Hurd*, 44 Pa. Super. Ct. 478 (N. I. L.), the defendant, a member of the firm which drew the check in question, stated in his affidavit of defense that the check was issued April 11, 1908, that it was not presented for payment until some time after July 31, 1908, at which date the partner of the defendant withdrew the entire firm balance from the drawee bank, and that the defendant subsequently settled with said partner, upon the dissolution of the firm, upon the assumption that this check had been paid. The court held that this affidavit of defense was insufficient. After referring to section 186, N. I. L., the court said: "This is declaratory of the existing law. The difficulty in the way of its application to the case at hand is that the efficient cause of the plaintiff's loss (if he can be said to have suffered any) was not the delay in presenting the check, but the drawing of the money out of the bank by his copartner, and the appellant's joining in the dissolution of the partnership and settling with his partner without ascertaining whether the check had been paid. In these circumstances the delay would not have constituted a defense prior to the act of 1901 (see *Flemming v. Denny*, 2 Phila. [Pa.] 111), and does not constitute a defense since that act." See *Cassel v. Reglerer*, 114 N. Y. Supp. 601 (N. I. L.).

¹⁸ See the cases above cited. And see *Alexander v. Burchfield*, 7 Man. & G. 1061; N. I. L. § 186.

sary to inquire if there was any unreasonable delay. * * * Under ordinary circumstances, the only rule is, that, if things have continued the same, and no damage has arisen from delay of presentment, the drawer continues liable."¹⁴ It is in this sense only that the drawer is entitled to have his check presented within a reasonable time.

In like manner, contrary to the rule governing other bills of exchange, the drawer¹⁵ of a check is not discharged by failure of the holder to give him notice of the dishonor of the check by the bank, unless he has been prejudiced thereby.¹⁶ Notice should be given, however, within a reason-

¹⁴ Per Lord Denman, C. J., in *Robinson v. Hawksford*, 9 Q. B. 52.

¹⁵ As to the indorser of a check, see note 10, *supra*.

¹⁶ *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 607, 19 L. Ed. 1008; *Heartt v. Rhodes*, 66 Ill. 351; *Lester v. Given*, 8 Bush (Ky.) 360; *Stewart v. Smith*, 17 Ohio St. 85. The Negotiable Instruments Law seems to provide that the drawer of a check is discharged by the failure to give him notice of dishonor, whether or not loss is thereby caused to him. N. I. L. §§ 89, 185, 186. See comments by Charles L. McKeehan, reprinted in *Brannan, Anno. N. I. L.* (2d Ed.) 287, 288. Thus construed, that act effects an important and, it seems, unfortunate change in the law merchant. See criticism by Professor Ames, reprinted in *Brannan, Anno. N. I. L.* (2d Ed.) 177. But in *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (N. I. L.), it was held that failure to give notice of dishonor did not discharge the drawer of a check, in the absence of a showing of loss to him resulting from such failure. The court said (63 Wash. 79, 114 Pac. 914): "For the purposes of this case we will * * * further assume that the failure of the respondent and its agent to promptly notify appellant the check was not paid on presentation was also negligence. Yet we conclude that the appellant has not shown that such negligence resulted in any loss or damage to him. Negligence of respondent or the Pacific National Bank can be of no avail to appellant, unless it caused him loss which he would not otherwise have sustained." The opinion, however, does not describe the process of interpretation by which this conclusion was reached. No other case seems to have arisen in which it has been decided whether or not the Negotiable Instruments Law effects this change in the law merchant. In *Ewald v. Faulhaber Stable Co.*, 55 Misc. Rep. 275, 105 N. Y. Supp. 114 (N. I. L.), the complaint of the executrix of the payee against the drawer of the check did not allege that notice of dishonor had been given to the defendant, nor that no damage resulted to the defendant drawer from the failure to give such notice. It was held that a demurrer to this complaint should have been sustained.

able time (ordinarily, not later than the next secular day after the bank refuses payment), so as to enable the drawer to take steps to protect himself.¹⁷ If such notice is not giv-

Accord: Scanlon v. Wallach, 53 Misc. Rep. 104, 102 N. Y. Supp. 1090 (N. I. L.). But this same conclusion had been reached independently of the Negotiable Instruments Law. Goodwin v. Cobe, 24 Misc. Rep. 389, 53 N. Y. Supp. 415; Pollard v. Bowen, 57 Ind. 232. These cases decide merely that the absence of damage from the failure to give notice is an alternative condition precedent to recourse against the drawer of a check, and as such must be pleaded and proved by the plaintiff holder as a part of his case. The report of Kuflick v. Glasser, 114 N. Y. Supp. 870 (N. I. L.), does not show whether or not there was any evidence at the trial tending to show that the defendant drawer was not damaged by the failure to give notice of dishonor. The appellate court reversed a judgment for the plaintiff holder on the ground that there was no evidence of notice of dishonor, citing N. I. L. § 89. In Ross v. Saron, 93 N. Y. Supp. 553, a case which does not appear from the report to have arisen under the Negotiable Instruments Law, the report is deficient in the same respect as in Kuflick v. Glasser, *supra*. Judgment for the plaintiff holder was reversed because there was no evidence of presentment, of notice of dishonor, or that payment was stopped by the defendant drawer. In Bacigalupo v. Parrilli, 112 N. Y. Supp. 1040 (N. I. L.), it was assumed to be shown by the evidence that the drawee stopped payment before notice of dishonor was given to, but after such notice, if duly given, would, in due course, have reached, the defendant drawer. Judgment for the plaintiff holder was reversed. These cases are sustainable on the ground that the burden is upon the plaintiff holder to show that the drawer did not suffer loss by reason of the failure to give notice of dishonor, without attributing to the Negotiable Instruments Law the unfortunate result in question. See note 11, *supra*. The case last cited is also sustainable upon the ground that, where the drawer shows a failure to give due notice and also the stopping of payment by the drawee bank after the expiration of the period within which, if due diligence were used by the holder, the defendant would have been advised of the dishonor, but before the time when such notice was actually received by the defendant, there arises a rebuttable presumption of fact that there was damage to the drawer resulting from such failure equal to the amount called for by the check. Such a presumption arises, under similar circumstances, where there is a failure to make presentment of a check. Watt v. Gans, 114 Ala. 264, 21 South. 1011, 62 Am. St. Rep. 99, and cases cited. Compare Cassel v. Regerer, 114 N. Y. Supp. 601 (N. I. L.). See note 11, *supra*.

¹⁷ The rules determining what is notice of the dishonor of a check are the same as those applying to any other bill of exchange. See §§ 146-147c, *supra*.

en, and the drawer is prejudiced, he will be discharged pro tanto.¹⁸

Status of a "Stale" Check

While, as we have just seen, the drawer of a check is not discharged by unreasonable delay of the holder in presenting it for payment, unless prejudice has resulted, it is always unsafe to delay presentation, not only because loss may thus discharge the drawer or indorser, but for the further reason that a "stale" check is rightly looked upon with suspicion, for checks are not supposed to remain long in circulation. The fact, therefore, that a check is stale when presented for payment has been held sufficient to put the bank upon inquiry, so that, if it pays such a check without inquiry, it will be held to have done so at its peril in case the check is for any reason invalid as against the drawer.¹⁹ It has also been held that the staleness of a check is sufficient to put a purchaser of it upon inquiry as to equities that may exist between the drawer and the payee.²⁰

RIGHTS OF HOLDER AGAINST BANK

151. By the weight of authority, though there are decisions to the contrary, which are controlling in the particular jurisdictions, the holder of a check has no right of action against the bank on which it is drawn for refusal to pay it, unless the bank has assumed an obligation to him by certifying or accepting it; his only remedy in such a case being against the drawer, and against the indorsers, if there are any.

¹⁸ As to when presentment or notice of dishonor of checks, as well as of other demand bills, is dispensed with or excused, see §§ 148-148b, supra.

¹⁹ Daniel, Neg. Inst. (3d Ed.) § 1632; *Lancaster Bank v. Woodward*, 18 Pa. 357, 57 Am. Dec. 618.

²⁰ *First Nat. Bank of Newton v. Needham*, 29 Iowa, 249; *Skillman v. Titus*, 32 N. J. Law, 96. As to when demand instruments, including notes, checks, and other bills, have been in circulation so long that a subsequent holder will not be a holder in due course, see *supra*, p. 442 et seq.

152. Where a bank pays a check to a holder under an unauthorized indorsement, and charges the amount to the account of the drawer, it is liable for the amount of the check to the true holder on demand. The action, it would seem, should be brought, not on the check, but on the promise implied in law from its receipt of the money from the drawer for the true holder's use.

It would seem that there is no privity of contract between the payee or holder of a check and the bank upon which it is drawn, and, therefore, that the payee or holder cannot maintain an action at law against the bank on its refusal to honor the check, unless the bank has expressly, or by its conduct, assumed an obligation to him; but there is upon this question a direct conflict in the authorities. Some of the courts have held that the check is an equitable assignment of the amount in the hands of the banker to the payee or holder, and that there is an implied contract between the bank and the holder, so as to render the bank liable to the latter on its refusal to pay the check.²¹ By the weight of authority, however, and, it would seem, on principle, there is no assignment, nor privity of contract, and the bank is not liable to the holder of an uncertified and unaccepted check, either at law or in equity.²² His remedy

²¹ Fogarties v. State Bank, 12 Rich. (S. C.) 518, 78 Am. Dec. 468; Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146; Munn v. Burch, 25 Ill. 35; Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids, 68 Ill. 398; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212, 22 Am. Rep. 185; National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Lester v. Given, 8 Bush (Ky.) 357; Weinstock v. Bellwood, 12 Bush (Ky.) 139; McGrade v. German Sav. Inst., 4 Mo. App. 330; Zelle v. German Sav. Inst., 4 Mo. App. 401; Senter v. Continental Bank, 7 Mo. App. 532. The Negotiable Instruments Law changes the law upon this point. N. I. L. § 189; Boswell v. Citizens' Sav. Bank, 123 Ky. 485, 96 S. W. 797 (N. I. L.), *semble*; Raeser v. Nat. Exchange Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979 (N. I. L.), *semble*.

²² Schroeder v. Central Bank, 34 Law T. (N. S.) 735, per Brett, J. And see Gibson v. Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194; Bullard v. Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433; Dana v. Boston Third Nat. Bank, 13 Allen (Mass.) 448, 90 Am. Dec. 216; National

is against the drawer, and to the drawer only is the bank liable if its refusal to pay was a breach of its contract. In an English case it was held that the holder of an uncertified check could not maintain an action at law against the bank under a statute allowing the assignee of a chose in action to sue thereon in his own name at law. "The bank," it was said, "has made a contract with the drawer that they

Bank of the Republic v. Millard, 10 Wall. 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 484; *Aetna Nat. Bank v. Fourth Nat. Bank of City of New York*, 46 N. Y. 82, 7 Am. Rep. 314; *Tyler v. Gould*, 48 N. Y. 682; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55; *Second Nat. Bank of Detroit v. Williams*, 13 Mich. 282; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. Law, 255, 50 Am. Rep. 417; *Loyd v. McCaffrey*, 46 Pa. 410; *First Nat. Bank of Mt. Joy v. Gish's Assignees*, 72 Pa. 13; *Moses v. Franklin Bank*, 34 Md. 574; *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *St. John v. Homans*, 8 Mo. 383; *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590; *Colorado Nat. Bank of Denver v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142; *Northern Trust Co. v. Rogers*, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526; N. I. L. § 189. *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182 (N. I. L.); *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227 (N. I. L.); *Re Yungbluth* (D. C.) 209 Fed. 116 (N. I. L.). A fortiori, the subsequent transfer of a check by delivery or indorsement and delivery does not, by itself, constitute an assignment of the amount of the deposit corresponding to the amount of the check. *Balsam v. Mutual Alliance Trust Co.*, 74 Misc. Rep. 465, 132 N. Y. Supp. 325 (N. I. L.). But although the drawing or indorsing of a check, completed by delivery, does not, by itself, constitute an assignment, the drawing of the check may be one of several facts which together constitute an assignment. *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. In *Hove v. Stanhope State Bank*, 138 Iowa, 39, 115 N. W. 476 (N. I. L.), it appeared that a debtor having a deposit in a bank wrote to his creditor, the plaintiff, that the money for the payment of his claim and that of another person was in the drawee bank, and that the plaintiff should get the money for the payment of both claims. A few days later the debtor, at the request of the plaintiff, drew a check for the amount of the deposit in the bank and sent it to the plaintiff, together with the deposit slip which he had received from the bank, and upon which he wrote an order directing the bank to pay the same to the plaintiff. It was held that these facts constituted an assignment of the rights of the depositor against the bank. See *Raeisser v. Nat. Exch. Bank*, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979.

will honor his checks to the amount of his account. They break that contract. How can that give a right of action to a third person? The check is but an order to pay, and not an absolute assignment of anything." In Hopkinson v. Forster²³ it was held that the bank is not liable to the holder in equity. "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check, when he has sufficient assets in his hands. If he does not fulfill his contract, he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of Keene v. Beard, but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder."²⁴

Payment on Unauthorized Indorsement

Where a bank pays a check to a holder under an unauthorized indorsement, and charges the check to the account of the drawer, it has been held that it is liable for the amount of the check to the true holder on demand.²⁵

The action, it is submitted, should properly be brought, not on the check, but for money had and received—that is, on the promise implied in law from the receipt by the bank of the amount of the check from the drawer for the use of the true holder. In National Bank of the Republic v. Millard,²⁶ where the court held that the true holder of a check paid to another under a forged indorsement cannot sue the bank for refusing payment to him, in the absence of proof

²³ L. R. 19 Eq. 74.

²⁴ Hopkinson v. Forster, L. R. 19 Eq. 74.

²⁵ Ellery v. People's Bank, 114 N. Y. Supp. 108 (N. I. L.), where it was held that an action for the conversion of a check in which damages equal to the amount of the check and interest can be recovered, lies by the payee holder of a check against the drawee bank, which retains the check after having paid its face amount to one who stole it from the plaintiff and indorsed the plaintiff's name upon it, without authority. See Belestine v. First Nat. Bank (Mo. App.) 164 S. W. 160; U. S. v. Nat. Bank, 205 Fed. 433, 123 C. C. A. 501.

²⁶ 10 Wall. 152, 19 L. Ed. 897.

that it was accepted by the bank or charged against the drawer, it was said: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the drawer, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to him to pay it on demand."²⁷ In *Seventh Nat. Bank v. Cook*,²⁸ the Supreme Court of Pennsylvania, purporting to apply the principle above stated, held that the payment of a check to the holder under an unauthorized indorsement, the check being charged to the account of the maker, amounts to an acceptance, and binds the bank to pay the true holder on presentment. It was said in this case that "it is, in fact, an acceptance, and binds the bank as a certified check does. It is tantamount to an acceptance of a draft." It does not seem right to base this decision on the ground that the check is accepted or certified by the bank, though the court seems to have done so, losing sight, it seems, of the principle stated in *Bank of the Republic v. Millard*, upon which it relied. There was in fact no certification of the check, nor any acceptance of it by the bank on presentment which could be construed as a promise in fact to the true holder to pay the check. The action should not be on the theory that the bank has certified the check, but should be on the theory that, having retained the money in settling

²⁷ But in *Lonier v. State Sav. Bank*, 149 Mich. 483, 112 N. W. 1119 (N. I. L.), it was held that the payee, whose indorsement had been forged upon the check, the amount of which was paid to the forger by the bank, could not maintain an action for money had and received to his use against the bank, although the bank had returned the check, marked "Paid," to the drawer, and had been credited with its payment in a settlement with the drawer. Accord: *B. & O. Ry. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837 (N. I. L.).

²⁸ 73 Pa. St. 483, 13 Am. Rep. 751. See, also, *Dodge v. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648; *Id.*, 30 Ohio St. 1; *Vanbibber v. Louisiana Bank*, 14 La. Ann. 481, 74 Am. Dec. 442.

with the drawer of the check, it holds the same for the use of the true holder of the check, the action being on the promise created by law for money had and received.

CERTIFICATION AND ACCEPTANCE OF CHECKS

153. By certifying a check to be good, the bank assumes an unconditional obligation to the holder presenting it, and to every subsequent holder, to pay it on demand; and this obligation may be enforced by the holder against the bank. And a delay in presentation will not discharge the obligation.
154. The certification of a check at the instance of the holder discharges the drawer and indorsers from liability, but the drawer is not discharged where he himself has it certified, and puts it in circulation. The drawer will also be discharged if the holder takes the parol acceptance of the bank instead of payment.
155. Where the drawer of a check has no funds in the bank, and the bank verbally promises the holder to honor the check, this, according to the weight of authority, is a promise to pay the debt of another, within the statute of frauds, and thus unenforceable unless evidenced by a writing. If, however, the bank has funds of the drawer when the promise is made, it is held not to be within the statute.

Certified Checks—Liability of Bank

A certified check is a check which the bank on which it is drawn has certified to be good, for the purpose of assuring the holders of it that it will be paid when presented. No particular form of words is necessary. All that is required is that it shall clearly appear that a certification is intended. A bank, by certifying a check as good, estops itself, as against a bona fide holder, to deny that it was valid as a draft upon the funds of the drawer, and would not, for instance, be allowed to say that it was made pay-

able to no one, and therefore void, for it would be held payable to bearer;²⁹ nor would it be allowed to dispute the genuineness of the drawer's signature, as against a bona fide holder,³⁰ or the sufficiency of funds in its hands to pay it.³¹ In reason it would seem that the certification of a check is, as regards a bona fide holder, an absolute promise that the check will be paid on demand. It has been held in New York, however, that the certification only estops the bank from denying that the signature is genuine, and that there are sufficient funds, leaving it free to dispute the genuineness of the body of the check as to the amount or as to the payee.³² If the officer or employé of a bank, whose regular duty it is to certify the checks drawn upon it, certifies a check in excess of his authority, the certification will nevertheless bind the bank as against a bona fide holder of the check. This, however, is a question of the law of agency.³³

The effect of the certification of a check by the bank upon which it is drawn is not merely a declaration of the fact that the maker has sufficient funds to his credit to pay it; but it is more. It creates a new and binding obligation on the part of the bank.³⁴ It is an appropriation of the

²⁹ *Willets v. Bank*, 2 Duer (N. Y.) 121.

³⁰ *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Commercial & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 30 Md. 11, 96 Am. Dec. 554.

³¹ *Espy v. First Nat. Bank*, 18 Wall. 621, 21 L. Ed. 947.

³² *Marine Nat. Bank v. National City Bank*, 59 N. Y. 87, 17 Am. Rep. 305.

³³ *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Id.*, 16 N. Y. 125, 69 Am. Dec. 678; *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 82 Am. Dec. 331; *Cooke v. State Nat. Bank*, 52 N. Y. 106, 11 Am. Rep. 667; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008. It is otherwise if the officer or employé has no authority to certify checks. *Pope v. Bank of Albion*, 57 N. Y. 126; *Mussey v. Eagle Bank*, 9 Metc. (Mass.) 306.

³⁴ N. I. L. § 187. Accordingly the drawee bank cannot, in an action upon the certified check, defeat the action by showing that the payee who obtained the certification had secured the check from the drawer by means of fraud. *Times Square Auto Co. v. Rutherford Nat. Bank* (N. J.) 73 Atl. 479 (N. I. L.). The court there said that, if the certification had been obtained by the drawer before delivery

funds of the drawer,⁸⁵ to the amount of the check, to its payment, and an unconditional promise by the bank to make the payment on demand. This promise the bank impliedly makes to every subsequent holder of the check, and it may be enforced by him in an action against the bank.⁸⁶

to the payee, the fraud upon the drawer would have been a good defense in the action against the drawee. This dictum seems erroneous. A fraud upon or breach of trust toward a third party in acquiring a legal right of action is not an equitable defense in an action upon that right of action. *Prouty v. Robarts*, 6 CUSH. (Mass.) 19, 52 AM. DEC. 761. Compare N. I. L. § 88. Nor would a recovery against the drawee bank result merely in a circuitu^t of action. The certification created a new obligation, by reason of which the drawee bank presumably charged the drawer's account with the amount of the check. Certifying the check was at least conditional payment of the depositor drawer's claim against the drawee to the amount of the check. The bank, upon being obliged to pay the amount of the certified check, would acquire no right of action against the drawer.

⁸⁵ The practice of banks is to charge the drawer with the amount of the check immediately upon certification. *Poess v. Twelfth Ward Bank of City of New York*, 43 Misc. Rep. 45, 86 N. Y. Supp. 857 (N. I. L.); *Cullinan v. Union Surety & Guaranty Co.*, 79 App. Div. 409, 80 N. Y. Supp. 58 (N. I. L.); *Schlesinger v. Kurzrok*, 47 Misc. Rep. 634, 94 N. Y. Supp. 442 (N. I. L.). See *infra*, p. 591. The certification is *prima facie* only conditional payment of the debt of the drawee bank to the depositor drawer. *Cullinan v. Union Surety & Guaranty Co.*, 79 App. Div. 409, 80 N. Y. Supp. 58 (N. I. L.). In that case it appeared that the defendant surety company executed the bond in suit, conditioned upon the drawee bank safely keeping the deposit of the plaintiff drawer (state commissioner of excise) and paying it over upon any legal demand therefor. The plaintiff drew several checks, had them certified by the drawee, and delivered them to the payees. Immediately after the certification the drawee bank, unknown to the drawer, charged the drawer's account with the amount of the checks and credited the same amount to the payees. Before presentment and notice, which were duly had, the bank suspended payment, and its assets were transferred to a receiver. It was held that, upon delivery of these checks, duly indorsed or canceled, to the defendant, and the assignment of all the plaintiff's rights against the drawee bank, judgment should be entered for the plaintiff for the amount of the certified checks, unpaid uncertified checks, and the net balance in the bank. Compare *Schlesinger v. Kurzrok*, 47 Misc. Rep. 634, 94 N. Y. Supp. 442 (N. I. L.).

⁸⁶ This was held in *Willets v. Bank*, 2 Duer (N. Y.) 121, and many other cases may be cited to the same effect. See *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Florence Min. Co.*

In this respect, as we have seen, an uncertified check is on a different footing.

Delay in presenting a certified check does not discharge the bank from its obligation. "The obligation of the bank is simple and unconditional to pay upon demand; and in all such cases the demand may be made whenever it suits the convenience of the party entitled to the stipulated payment. When the business of a bank is properly conducted, it is not possible that it can sustain any loss or prejudice from this interpretation of its contract,—the contract which it makes in certifying a check; and it is only where delay may be prejudicial that the want of due diligence may be legally imputed; and operate as a bar to a claim otherwise valid. * * * There is in reality, in good sense, no distinction, in the nature of the liability created, between a certified check and a note of the bank payable on demand. Each is intended to circulate as money, each is an absolute promise to pay a specific sum upon demand, and laches in making the demand is no more imputable in the one case than in the other. The only difference between them is that the promise which in the note is expressed in the check is implied."³⁷

Discharge of Drawer and Indorsers by Certification or Acceptance of Check

The certification of a check at the instance of the holder operates as a discharge of the drawer from his liability, the holder's only remedy thereafter being against the bank; and in like manner it will operate as a discharge of prior indorsers, who, as to the holder, occupy the same position

v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. Ed. 1008; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 623; Id., 16 N. Y. 125, 69 Am. Dec. 678; Girard Bank v. Bank of Penn Tp., 39 Pa. 92, 80 Am. Dec. 507; Meads v. Merchants' Bank of Albany, 25 N. Y. 143, 82 Am. Dec. 331; Andrews v. German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; Mussey v. Eagle Bank, 9 Metc. (Mass.) 306; N. I. L. § 187.

³⁷ Willets v. Bank, 2 Duer (N. Y.) 121. And see the cases above cited.

as the drawer. That certification at the instance of the holder discharges the drawer was held in FIRST NAT. BANK OF JERSEY CITY v. LEACH.⁸⁸ The theory of the law, it was there explained, is that, where a check is certified to be good by the bank upon which it is drawn, the amount thereof is then charged to the account of the drawer. Every well-regulated bank adopts this practice to protect itself, and the reason therefor is so strong that the law presumes it is adopted by the banks. It follows that after a check is certified the drawer of the check cannot draw out the funds in the bank necessary to meet the certified check. The money is no longer his. If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it has already been appropriated by means of the check thus certified. As to him, it is precisely as if the bank had paid the money on the check, instead of certifying it. This, it is true, applies also to the acceptance of a time bill of exchange before it is due. When the drawee accepts, it is an appropriation of the funds pro tanto for the service and use of the payee or holder of the bill, so that the money ceases henceforth to be the money of the drawer, and becomes that of the payee or holder in the hands of the acceptor. Yet the acceptance of a time bill of exchange before due does not discharge the drawer. Its only effect is to make the acceptor the primary party to pay it. The parties to a certified check, however, due when certified, occupy a different position. There the money is due and payable when the check is certified, and the holder of the check, instead of taking it when he may, leaves it with the bank, and instead takes the bank's certificate that it is good, and its promise to pay

⁸⁸ 52 N. Y. 350, 11 Am. Rep. 708, Moore Cases Bills and Notes, 257. Accord: Metropolitan Nat. Bank of Chicago v. Jones, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; Continental Nat. Bank v. M. Cornhauser & Co., 37 Ill. App. 475; BORN v. FIRST NAT. BANK, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312, Moore Cases Bills and Notes, 259; Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193, Fed. Cas. No. 4,532; First Nat. Bank v. Whitman, 94 U. S. 343, 345, 24 L. Ed. 229; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; N. I. L. § 188.

it on demand. The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder, thus changing the position and increasing the risk of the drawer, without discharging him. If the holder,³⁹ therefore, chooses to have the check certified instead of paid, he discharges the drawer, and his only remedy is against the bank.⁴⁰

³⁹ In *Meuer v. Phoenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83 (N. I. L.), the action was by a transferee without indorsement, that is, by an assignee of the check, against the drawee bank. The payee of the check, who received it for value from the drawer, delivered it for full value to the plaintiff and then died. The plaintiff thereafter sent the check by messenger to the defendant bank. The teller certified the check without any question. There was nothing on the check or otherwise to show that the bank knew that the check had been delivered by the payee to another with the intention of parting with all interest in it. The executor of the payee refused to indorse the check as certified. It was held that instructions that if these facts were proved the plaintiff was entitled to recover were correct. The court said that the plaintiff was a holder of the check and that the promise was made to him, although he was unknown to the promisor. That the plaintiff was not the holder of the instrument seems clear. N. I. L. §§ 30, 191. It also seems clear that the drawee's promise (certification) was manifestly intended as, and in form was, a promise to the payee named in the check or his legal representative. It is true that, since the assignee had authority from the payee to receive payment of the check, the certification discharged the drawer. But since there was not a new assignment or indorsement of the certified check to the plaintiff by the payee, or his personal representative, the result of the case is to permit one who is not an assignee of the right of action on the check against the drawee bank, but who is in equity entitled to an indorsement from the holder of such right of action, to maintain an action in his own name, upon the formal contract of the certifying bank embodied in the check.

⁴⁰ *FIRST NAT. BANK OF JERSEY CITY v. LEACH*, 52 N. Y. 350, 11 Am. Rep. 708, Moore Cases Bills and Notes, 257; *Freund v. Importers' & Traders' Nat. Bank*, 76 N. Y. 352; *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933, 26 Am. Rep. 126; *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241; N. I. L. § 188; *St. Regis Paper Co. v. Tonawanda Board & Paper Co.*, 107 App. Div. 90, 94 N. Y. Supp. 946 (N. I. L.);

The rule does not apply where the drawer himself causes the check to be certified, and then puts it in circulation. In such a case the reason for the rule does not apply, and he also remains liable.⁴¹

The same is true where the holder of a check takes the parol acceptance of the bank instead of payment. If the payee or holder of a check presents the check, and the bank

Gallo v. Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 633, 32 L. R. A. (N. S.) 66 (N. I. L.). As to when certification is made under a mistake of fact, and such certification is avoided, see Security Sav. & Tr. Co. v. King (Or.) 138 Pac. 465. It has also been held that the giving of a deposit slip in return for the delivery of the check to the drawee bank constitutes a payment of the check discharging the drawer. Burns v. Yocum, 81 Ark. 127, 98 S. W. 936. But the giving and accepting of a check upon another bank in return for the delivery of the check to the drawee do not necessarily constitute a payment of the check discharging the drawer and indorsers. Turner v. Bank of Fox Lake, *42 N. Y. 425; Smith v. Miller, 52 N. Y. 545; First Nat. Bank of Grafton v. Buckhannon Bank, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332. But see Noble v. Doughton, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167; note 25 L. R. A. 200. Compare notes, 3 L. R. A. (N. S.) 1179. But greater diligence must be used in the presentment of such substituted check than in presenting the original check. Noble v. Doughton, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167. See note, 3 L. R. A. (N. S.) 1167, 1168; note, 51 Am. St. Rep. 94.

⁴¹ BORN v. FIRST NAT. BANK, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312, Moore Cases Bills and Notes, 259; FIRST NAT. BANK OF JERSEY CITY v. LEACH, *supra*; Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472. "When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But, when the payee or holder of a check presents it for certification, the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder." Minot v. Russ, *supra*. Nor is an indorser discharged where he himself procures a check to be certified and then transfers it. Mutual Nat. Bank v. Rotge, 28 La. Ann. 933, 26 Am. Rep. 126.

offers to pay it, he cannot, instead of taking the money, leave it with the bank, without doing so at his own risk. If the bank fails, the drawer is discharged, and it makes no difference that the check was presented on the same day it was received, and the bank suspended soon afterwards, and refused payment, when the check was again presented on the same day. He might, it is true, have waited until the next day to present the check, without being chargeable with laches, but having presented it earlier, and having refused to receive payment when offered, he cannot hold the drawer.⁴²

Verbal Acceptance or Promise by Bank to Pay Check

A bank may render itself liable to the holder of a check otherwise than by a certification of it. It may under some circumstances render itself liable by a verbal acceptance, and a promise, express or implied from acceptance, to pay it; and under some circumstances an acceptance and promise may be implied from its conduct.⁴³ If the drawer of a check has no funds in the bank, and the bank verbally promises the holder to honor the check, it would seem clear that this is a mere parol promise to answer for the debt of the drawer, and, under the section of the statute of frauds requiring a promise to answer for the debt of another to be in writing, not enforceable against the bank. In Morse v. Massachusetts Nat. Bank,⁴⁴ a bank in which the drawer of checks upon it had no funds had verbally promised the holder to pay the checks, if deposited in some other bank, and presented through the clearing house. It was held that

⁴² Simpson v. Pacific Mut. Life Ins. Co., 44 Cal. 139.

⁴³ Where, by statute, the acceptance of a bill of exchange, to be binding as such must be in writing, such verbal acceptance does not bind the bank, unless it is binding as a simple contract obligation at common law. Anderson v. Jones, 102 Ala. 537, 14 South. 871; Pfaff v. Cummings, 67 Mich. 143, 34 N. W. 281; Overman v. Hoboken City Bank, 30 N. J. Law, 61; Weinhauer v. Morrison, 49 Hun, 498, 2 N. Y. Supp. 544; N. I. L. § 132; Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 88 Pac. 778, 117 Am. St. Rep. 182 (N. I. L.). See Ballard v. Home Nat. Bank, 91 Kan. 91, 136 Pac. 935 (N. I. L.); Kellogg v. Citizens' Bank (Mo. App.) 162 S. W. 643 (N. I. L.). As to constructive acceptance, see note 49, infra.

⁴⁴ 1 Holmes, 209, Fed. Cas. No. 9,857.

this was a mere parol promise to pay another's debt, within the statute of frauds, and that the holder, therefore, acquired no right against the bank.⁴⁶ And it was held that the reasons for holding good a parol accommodation acceptance of a bill of exchange do not apply to the case of a bank check. There are cases, however, apparently sustaining the proposition that parol acceptances of checks by the bank may be enforced without regard to whether the bank has funds of the drawer.⁴⁷

If the bank has funds of the drawer, and verbally accepts the check, and promises the holder, expressly or impliedly, by such acceptance, to pay it, the leaving of the funds with the bank instead of withdrawing them is a sufficient consideration to support the promise; and the promise, being to pay the promisor's (the bank's) own debt (that is, the debt it owes to the drawer), is not within the statute of frauds. The holder can therefore maintain an action against the bank on such a promise.⁴⁸

A bank is entitled to a reasonable time in which to ascertain whether the drawer's signature is genuine, and whether he has sufficient funds to meet the check, and its retention of the check for such a time cannot be construed as an acceptance of the check and promise to pay it.⁴⁹ But if

⁴⁶ Accord: *Quin v. Hanford*, 1 Hill (N. Y.) 84; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Manley v. Geagan*, 105 Mass. 445; *Plummer v. Lyman*, 49 Me. 229; *Wakefield v. Greenhood*, 29 Cal. 600; *Walton v. Mandeville*, 56 Iowa, 597, 9 N. W. 913, 41 Am. Rep. 123; *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 76 N. E. 52, 109 Am. St. Rep. 314; *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, 27 S. E. 209; *Browne*, Statute of Frauds, § 174. But since a verbal accommodation acceptance is not in terms a promise to answer for the debt, default, or miscarriage of another, it seems that the correct conclusion is contra. *JARVIS v. WILSON*, 46 Conn. 90, 33 Am. Rep. 18, *Moore Cases Bills and Notes*, 5; *Wynne v. Raikes*, 5 East, 174; *Laflin & Rand Power Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472; *O'Donnell v. Smith*, 2 E. D. Smith (N. Y.) 124. See *Ames Cas. Suretyship*, p. 107, note 4.

⁴⁷ See note 45, supra.

⁴⁸ See the cases hereafter cited. *Espy v. First Nat. Bank*, 18 Wall. 621, 21 L. Ed. 947; *Mason v. Dousay*, 35 Ill. 424, 85 Am. Dec. 368; *Bank of Rutland v. Woodruff*, 34 Vt. 89.

⁴⁹ *Boyd v. Emmerson*, 2 Adol. & E. 184; *Overman v. Hoboken City*

it retains a check for an unreasonable time, it runs the risk of being held to have impliedly accepted the check so as to become liable to the holder to pay it.⁴⁹

FAILURE OF BANK TO HONOR CHECK

156. A bank having funds of a depositor is bound to honor his checks to the amount of those funds, and, for a failure to do so, is liable for damages. The bank, however, must have had a reasonable time since the deposit in which to make proper entries on its books so as to show the amount to the depositor's credit.

When a bank receives funds on deposit it impliedly contracts with the depositor that it will pay checks drawn by him to the amount of the deposit, and a failure to honor his check when there are sufficient funds to his credit is not only a breach of contract, but a tort as well, entitling the depositor to recover any damage he may have sustained, and to recover nominal damages, at least, if no actual damage has been sustained.⁵⁰ Of course, the check

Bank, 31 N. J. Law, 583; Kellogg v. Citizens' Bank (Mo. App.) 162 S. W. 643 (N. I. L.).

⁴⁹ First Nat. Bank of Northumberland v. McMichael, 106 Pa. 460, 51 Am. Rep. 529. In New York it has been held that a bank is bound to know the state of its depositor's account immediately upon presentation of his check. Oddie v. National City Bank, 45 N. Y. 736, 6 Am. Rep. 160. As to constructive acceptance of a check, see Hays v. Lathrop Bank, 75 Mo. App. 211; N. I. L. § 137; First Nat. Bank v. Whitmore, 177 Fed. 397, 101 C. C. A. 401 (N. I. L.); Wisner v. First Nat. Bank of Gallitzin, 220 Pa. 21, 68 Atl. 935, 17 L. R. A. (N. S.) 1266 (N. I. L.); Provident S. & B. Co. v. First Nat. Bank, 37 Pa. Super. Ct. 17 (N. I. L.); State Bank v. Weiss, 46 Misc. Rep. 93, 91 N. Y. Supp. 278 (N. I. L.). For a consideration of these cases, see pp. 136, 137, *supra*.

⁵⁰ It was so held in Marzetti v. Williams, 1 Barn. & Adol. 415. And see Rollin v. Steward, 14 C. B. 595; Whitaker v. Bank of England, 1 Cromp., M. & R. 744; Patterson v. Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Gray v. Johnston, L. R. 3 H. L. 1; National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368; Hooper v. Herring (Ala. App.) 63 South. 785; Levin v. Com. Ger-

must be drawn properly, so as to raise a duty on the part of the bank to pay it.⁵¹

To render a bank liable for failure to honor a check, the depositor must have had a right to draw the money. A bank may refuse to honor a check if there are not sufficient funds to the credit of the depositor, after offsetting a balance of account due from him to the bank.⁵² And there must be a sufficient balance to pay the check in full, for the bank cannot be required to make a part payment. The duty and authority of a bank to pay a check drawn on it by a depositor are determined by counterman of payment,⁵³ or by notice of the drawer's death.⁵⁴

mania Sav. & T. Co., 133 La. 492, 63 So. 601. The rule also applies to notes and acceptances of a depositor made payable at the bank. Whitaker v. Bank of England, 1 Cromp., M. & R. 744; Robarts v. Tucker, 16 Q. B. 560. It is not necessary to allege and prove special damages, at least if the form of action be tort, but the plaintiff may recover general compensatory damages. Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; Bank of Commerce v. Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; Patterson v. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Atlanta Nat. Bank v. Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; Svendsen v. State Bank of Duluth, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522.

⁵¹ A bank is not bound to honor a check drawn on one of its branches by a depositor in another branch. Woodland v. Fear, 7 El. & Bl. 519; Gray v. Johnston, L. R. 3 H. L. 1.

⁵² Garnett v. McKewan, L. R. 8 Exch. 10; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707. This applies where the balance against the depositor is at another branch of the bank. Garnett v. McKewan, *supra*.

⁵³ See Cohen v. Hale, 3 Q. B. Div. 371; McLean v. Clydesdale Banking Co., 9 App. Cas. 95; Kellogg v. Citizens' Bank (Mo. App.) 162 S. W. 643 (N. I. L.).

⁵⁴ Rogerson v. Ladbrooke, 1 Bing. 93. Such is the provision of the English Bills of Exchange Act (section 75). It is said that the Negotiable Instruments Law in its original draft contained the following: "The death of the drawer does not operate as a revocation of the authority of the bank to pay a check if the check is presented for payment within ten days from the date thereof"—but that this was struck out of the final draft. The proposed provision was taken from Pub. St. Mass. Supp. 1888, c. 210. See Huffcut, Neg. Inst. 80. Mr. Daniel maintains that the idea that death operates as a revocation is a total misconception of the law. Daniel, Neg. Inst., § 1618b.

It is only reasonable that, after a deposit is made, the bank should be allowed a reasonable time in which to enter the credit on its books, so that the clerk whose duty it is to pay checks may know the amount to the drawer's credit. If a deposit were made with one clerk, and a check immediately presented to another, before he could have time to know of the deposit, the bank would not be liable for failure to honor the check. But if a reasonable time has elapsed between the deposit and presentation of the check the bank will be liable, notwithstanding the fact that the credit was not entered, for it must keep proper books, and conduct its business in a proper manner.⁵⁵

⁵⁵ This was in effect held in *Marzetti v. Williams*, 1 Barn. & Adol. 415, *supra*. In that case a depositor on the 17th of the month, when he had £69, to his credit in a bank, drew a check of that date for £87. At 11 o'clock on the 19th a deposit of £40 was made. At 3 o'clock on the 19th the check was presented, and payment refused. The judge held that a bank who received a sum of money belonging to his customer became his debtor the moment he received it, and was bound to pay a check drawn by such customer after the lapse of such a reasonable time as would afford an opportunity to the different persons in his establishment of knowing the fact of the receipt of such money, and directed the jury to find against the banker if they were of opinion that such a reasonable time had intervened between the receipt of the money at 11 o'clock and the presentment of the check at 3. The court said that it could not be expected if a sum of money was paid to a clerk in a large banking office, and immediately afterwards a check presented to another clerk in a different part of the office, that the latter should be immediately acquainted with the fact of the deposit, but a reasonable time should be allowed for that purpose, and he told the jury that they should consider whether the banker ought or ought not, between 11 and 3 o'clock, to have had in some book an entry of deposit which would have informed all the clerks of the state of the account. The jury found against the bank, and the verdict was sustained. See, also, *Whitaker v. Bank of England*, 1 Cromp., M. & R. 744.



APPENDIX

STATES, TERRITORIES AND POSSESSIONS OF THE UNITED STATES IN WHICH THE NEGOTIABLE INSTRUMENTS LAW IS IN FORCE

- Alabama.* Jan. 1, 1908. Code 1907, ch. 115; Laws 1909, p. 126.
Alaska. Apr. 28, 1913. Laws 1913, ch. 64.
Arizona. Sept. 1, 1901. Rev. St. 1901, tit. 49.
Arkansas. Apr. 23, 1913. Laws 1913, Act 81.
Colorado. Apr. 20, 1897. Rev. St. 1908, ch. 95.
Connecticut. Apr. 5, 1897. Gen. St. 1902, tit. 33, ch. 234.
Delaware. Jan. 1, 1912. Laws 1911, ch. 191.
District of Columbia. Apr. 3, 1899. Code of Laws, ch. 46; U. S. Stat. vol. 30, p. 785.
Florida. June 1, 1897. Gen. St. 1906, 4th div., tit. 5, ch. 2.
Hawaii. Apr. 20, 1907. Laws 1907, Act 89.
Idaho. March 10, 1903. Rev. Codes 1908, tit. 13, p. 1326.
Illinois. June 5, 1907. Rev. St. 1911, ch. 98.
Indiana. March 3, 1913. Laws 1913, ch. 63.
Iowa. Apr. 12, 1902. Code Supp. 1907, tit. 15, p. 729.
Kansas. June 8, 1905. Gen. St. 1909, ch. 84.
Kentucky. March 24, 1904. Statutes 1909 (Carroll) ch. 90 B, section 3720 B.
Louisiana. June 29, 1904. Laws 1904, Act 64.
Maryland. March 29, 1898. Ann. Civ. Code 1910, art. 13.
Massachusetts. Jan. 1, 1899. Rev. Laws 1902, ch. 73.
Michigan. June 18, 1905. Pub. Acts 1905, Act 265.
Minnesota. July 1, 1913. Laws 1913, ch. 272; Gen. St. 1913, p. 1291.
Missouri. Apr. 10, 1905. Rev. St. 1909, ch. 86, p. 3122.
Montana. March 7, 1903. Civ. Code 1907, tit. 15, p. 1593.
Nebraska. Aug. 1, 1905. Rev. St. 1913, ch. 54.
Nevada. May 1, 1907. Rev. Laws 1912, vol. 1, p. 769.
New Hampshire. Jan. 1, 1910. Laws 1909, ch. 123.
New Jersey. Apr. 4, 1902. Comp. St. 1910, vol. 3, p. 3732.
New Mexico. March 21, 1907. Laws 1907, ch. 83.
New York. May 19, 1897. Consol. Laws, ch. 38.
North Carolina. March 8, 1899. Rev. 1905, ch. 54.
North Dakota. March 7, 1899. Rev. Codes 1905 (Civ. Code) ch. 90.
Ohio. Jan. 1, 1903. Gen. Code 1910, pt. 2, tit. 7, div. 2, p. 1717.

- Oklahoma.* March 20, 1909. Rev. Laws 1910, ch. 49.
Oregon. Feb. 16, 1899. Gen. Laws 1910 (L. O. L.) tit. 40, ch. 2, p. 2128.
Pennsylvania. Sept. 2, 1901. Laws 1901, p. 194.
Philippines. Feb. 8, 1911. War Dept. Annual Reports 1911, vol. 4, p. 39 (Acts Philippine Com'n 1911, No. 2031).
Rhode Island. July 1, 1899. Gen. Laws 1909, tit. 19, ch. 200.
South Carolina. March 4, 1914. Acts 1914, Act 396, p. 668.
South Dakota. March 4, 1913. Comp. Laws 1913, vol. 2, p. 298.
Tennessee. May 16, 1899. Code Supp. 1897-1908, p. 571.
Utah. July 1, 1899. Comp. Laws 1907, tit. 53, p. 629.
Vermont. June 1, 1913. Laws 1912, Act 99.
Virginia. March 3, 1898. Code 1904, ch. 133A, § 2841A.
Washington. March 22, 1899. Rem. & Bal. Code, 1910, tit. 19, ch. 3.
West Virginia. Jan. 1, 1908. Acts 1907, ch. 81.
Wisconsin. May 15, 1899. Statutes of 1913, ch. 78.
Wyoming. Feb. 15, 1905. Comp. St. 1910, ch. 210.

TABLE SHOWING THE NUMBERING OF THE SECTIONS OF THE
 NEGOTIABLE INSTRUMENTS LAW IN THE STATES,
 ETC., WHICH HAVE ADOPTED IT.

		N. I. L. NUMBERING.																		
1	1	ALABAMA—Laws 1909, p. 126.	1	ARIZONA—Rev. St. 1901, tit. 49.	1	COLORADO—Rev. St. 1908, ch. 95.	1	CONNECTICUT—Gen. St. 1902, tit. 33, ch. 234.	1	DIST. OF COLUMBIA—U.S. Stat. Vol. 30, p. 785 (D. C. Code, ch. 46).	1	FLORIDA—Gen. St. 1906, 4th Div., tit. 5, ch. 2.	1	IDAHO—Rev. Codes 1908, tit. 13, p. 1326.	1	ILLINOIS—Rev. St. 1911, ch. 98.	1	KANSAS—Gen. St. 1909, ch. 84.	1	MARYLAND—Ann. Civ. Code 1910, art. 13.
2	2	2	2	3	3	4	4	5	5	6	6	7	7	8	8	9	9	10	20	
3	3	3	3	4	4	5	5	6	6	7	7	8	8	9	9	10	10	11	21	
4	4	4	4	5	5	6	6	7	7	8	8	9	9	10	10	11	11	12	22	
5	5	5	5	6	6	7	7	8	8	9	9	10	10	11	11	12	12	13	23	
6	6	6	6	7	7	8	8	9	9	10	10	11	11	12	12	13	13	14	24	
7	7	7	7	8	8	9	9	10	10	11	11	12	12	13	13	14	14	15	25	
8	8	8	8	9	9	10	10	11	11	12	12	13	13	14	14	15	15	16	26	
9	9	9	9	10	10	11	11	12	12	13	13	14	14	15	15	16	16	17	27	
10	10	10	10	11	11	12	12	13	13	14	14	15	15	16	16	17	17	18	28	
11	11	11	11	12	12	13	13	14	14	15	15	16	16	17	17	18	18	19	29	
12	12	12	12	13	13	14	14	15	15	16	16	17	17	18	18	19	19	20	30	
13	13	13	13	14	14	15	15	16	16	17	17	18	18	19	19	20	20	21	31	
14	14	14	14	15	15	16	16	17	17	18	18	19	19	20	20	21	21	22	32	

TABLE OF N. I. L. SECTIONS

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N. I. L. NUMBERING.		ALABAMA—Laws 1909, P. 126.		ARIZONA—Rev. St. 1901, tit. 49.		COLORADO—Rev. St. 1908, ch. 96.		CONNECTICUT—Gen. St. 1902, tit. 31, ch. 28.		DIST. OF COLUMBIA— U.S. Stat. Vol. 30, P. 755 (D. C. Code, ch. 46).		FLORIDA—Gen. St. 1906, 4th Div., tit. 6, ch. 2.		IDAHO—Rev. Codes 1908, tit. 18, p. 1326.		ILLINOIS—Rev. St. 1911, ch. 98.		KANSAS—Gen. St. 1909, ch. 84.		KENTUCKY—St. 1909 (Carroll) ch. 30B, § 3720b.		MARYLAND—Ann. Civ. Code 1910, art. 13.	
15	15	3318	4478	4185		15	2949	3472		23	5268		15	34									
16	16	3319	4479	4186		16	2950	3473		34	5269		16	35									
17	17	3320	4480	4187		17	2951	3474		35	5270		17	36									
18	18	3321	4481	4188		18	2952	3475		36	5271		18	37									
19	19	3322	4482	4189		19	2953	3476		37	5272		19	38									
20	20	3323	4483	4190		20	2954	3477		38	5273		20	39									
21	21	3324	4484	4191		21	2955	3478		39	5274		21	40									
22	22	3325	4485	4192		22	2956	3479		40	5275		22	41									
23	23	3326	4486	4193		23	2957	3480		41	5276		23	42									
24	24	3327	4487	4194		24	2958	3481		42	5277		24	43									
25	25	3328	4488	4195		25	2959	3482		43	5278		25	44									
26	26	3329	4489	4196		26	2980	3483		44	5279		26	45									
27	27	3330	4490	4197		27	2961	3484		45	5280		27	46									
28	28	3331	4491	4198		28	2962	3485		46	5281		28	47									
29	29	3332	4492	4199		29	2963	3486		47	5282		29	48									
30	30	3333	4493	4200		30	2964	3487		48	5283		30	49									
31	31	3334	4494	4201		31	2965	3488		49	5284		31	50									
32	32	3335	4495	4202		32	2966	3489		50	5285		32	51									
33	33	3336	4496	4203		33	2967	3490		51	5286		33	52									
34	34	3337	4497	4204		34	2968	3491		52	5287		34	53									
35	35	3338	4498	4205		35	2969	3492		53	5288		35	54									
36	36	3339	4499	4206		36	2970	3493		54	5289		36	55									
37	37	3340	4500	4207		37	2971	3494		55	5290		37	56									
38	38	3341	4501	4208		38	2972	3495		56	5291		38	57									
39	39	3342	4502	4209		39	2973	3496		57	5292		39	58									
40	40	3343	4503	4210		40	2974	3497		58	5293		40	59									
41	41	3344	4504	4211		41	2975	3498		59	5294		41	60									
42	42	3345	4505	4212		42	2976	3499		60	5295		42	61									
43	43	3346	4506	4213		43	2977	3500		61	5296		43	62									
44	44	3347	4507	4214		44	2978	3501		62	5297		44	63									
45	45	3348	4508	4215		45	2979	3502		63	5298		45	64									
46	46	3349	4509	4216		46	2979	3503		64	5299		46	65									
47	47	3350	4510	4217		47	2980	3504		65	5300		47	66									
48	48	3351	4511	4218		48	2981	3505		66	5301		48	67									
49	49	3352	4512	4219		49	2982	3506		67	5302		49	68									
50	50	3353	4513	4220		50	2983	3507		68	5303		50	69									
51	51	3354	4514	4221		51	2984	3508		69	5304		51	70									
52	52	3355	4515	4222		52	2985	3509		70	5305		52	71									
53	53	3356	4516	4223		53	2986	3510		71	5306		53	72									
54	54	3357	4517	4224		54	2987	3511		72	5307		54	73									
55	55	3358	4518	4225		55	2988	3512		73	5308		55	74									
56	56	3359	4519	4226		56	2989	3513		74	5309		56	75									
57	57	3360	4520	4227		57	2990	3514		75	5310		57	76									
58	58	3361	4521	4228		58	2991	3515		76	5311		58	77									
59	59	3362	4522	4229		59	2992	3516		77	5312		59	78									
60	60	3363	4523	4230		60	2993	3517		78	5313		60	79									

N. L. L. NUMBERING.									
		ALABAMA—Laws 1909. p. 126.		ARIZONA—Rev. St. 1901, tit. 49.		COLORADO—Rev. St. 1908, ch. 95.		CONNECTICUT—Gen. St. 1902, tit. 31, ch. 234.	
61	61	3364	4524	4231	61	2994	3518	79	5314
62	62	3365	4525	4232	62	2995	3519	80	5315
63	63	3366	4526	4233	63	2996	3520	81	5316
64	64	3367	4527	4234	64	2997	3521	82	5317
65	65	3368	4528	4235	65	2998	3522	83	5318
66	66	3369	4529	4236	66	2999	3523	84	5319
67	67	3370	4530	4237	67	3000	3524	85	5320
68	68	3371	4531	4238	68	3001	3525	86	5321
69	69	3372	4532	4239	69	3002	3526	87	5322
70	70	3373	4533	4240	70	3003	3527	88	5323
71	71	3374	4534	4241	71	3004	3528	89	5324
72	72	3375	4535	4242	72	3005	3529	90	5325
73	73	3376	4536	4243	73	3006	3530	91	5326
74	74	3377	4537	4244	74	3007	3531	92	5327
75	75	3378	4538	4245	75	3008	3532	93	5328
76	76	3379	4539	4246	76	3009	3533	94	5329
77	77	3380	4540	4247	77	3010	3534	95	5330
78	78	3381	4541	4248	78	3011	3535	96	5331
79	79	3382	4542	4249	79	3012	3536	97	5332
80	80	3383	4543	4250	80	3012	3537	98	5333
81	81	3384	4544	4251	81	3013	3538	99	5334
82	82	3385	4545	4252	82	3014	3539	100	5335
83	83	3386	4546	4253	83	3015	3540	101	5336
84	84	3387	4547	4254	84	3016	3541	102	5337
85	85	3388	4548	4255	85	3017	3542	103	5338
86	86	3389	4549	4256	86	3017	3543	104	5339
87	87	3390	4550	4257	87	3018	3544	—	5340
88	88	3391	4551	4258	88	3019	3545	105	5341
89	89	3392	4552	4259	89	3020	3546	106	5342
90	90	3393	4553	4260	90	3021	3547	107	5343
91	91	3394	4554	4261	91	3022	3548	108	5344
92	92	3395	4555	4262	92	3023	3549	109	5345
93	93	3396	4556	4263	93	3024	3550	110	5346
94	94	3397	4557	4264	94	3025	3551	111	5347
95	95	3398	4558	4265	95	3026	3552	112	5348
96	96	3399	4559	4266	96	3027	3553	113	5349
97	97	3400	4560	4267	97	3027	3554	114	5350
98	98	3401	4561	4268	98	3028	3555	115	5351
99	99	3402	4562	4269	99	3029	3556	116	5352
100	100	3403	4563	4270	100	3029	3557	117	5353
101	101	3404	4564	4271	101	3030	3558	118	5354
102	102	3405	4565	4272	102	3031	3559	119	5355
103	103	3406	4566	4273	103	3031	3560	120	5356
104	104	3407	4567	4274	104	3032	3561	121	5357
105	105	3408	4568	4275	105	3033	3562	122	5358
106	106	3409	4569	4276	106	3033	3563	123	5359

MARYLAND—Ann. Civ.

Code 1910, art. 13.

KENTUCKY—St. 1909
(Carroll) ch. 90B, § 3720b.ILLINOIS—Rev. St. 1911,
ch. 96.KANSAS—Gen. St. 1909,
ch. 84.IDAHO—Rev. Codes 1908,
tit. 18, p. 1826.FLORIDA—Gen. St. 1908,
4th Div., tit. 6, ch. 2.DIST. OF COLUMBIA—
U. S. Stat. Vol. 30, p. 786
(D. C. Code, ch. 46).CONNECTICUT—Gen. St.
1902, tit. 31, ch. 234.ARIZONA—Rev. St. 1901,
tit. 49.ALABAMA—Laws 1909.
p. 126.

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N. I. L. NUMBERING.	ALABAMA—Law P. 126.	ARIZONA—Rev. St. 1901, tit. 49.	COLORADO—Rev. 1908, ch. 96.	CONNECTICUT—Gen. St. 1902, tit. 33, ch. 234.	DIST. OF COLUMBIA— U. S. Stat. Vol. 30, p. 785 (D. C. Code, ch. 46).	FLORIDA—Gen. St. 1906, 4th Div., tit. 5, ch. 2.	IDAHO—Rev. Codes 1908, tit. 13, p. 1826.	ILLINOIS—Rev. St. 1911, ch. 98.	KANSAS—Gen. St. 1908, ch. 84.	KENTUCKY—St. 1909 (Carroll) ch. 90B, § 1720b.	MARYLAND—Ann. Civ. Code 1910, art. 13.
107	107	3410	4570	4277	107	3084	3564	124	5360	107	126
108	108	3411	4571	4278	108	3035	3565	125	5361	108	127
109	109	3412	4572	4279	109	3036	3566	126	5362	109	128
110	110	3413	4573	4280	110	3036	3567	127	5363	110	129
111	111	3414	4574	4281	111	3036	3568	128	5364	111	130
112	112	3415	4575	4282	112	3037	3569	129	5365	112	131
113	113	3416	4576	4283	113	3038	3570	130	5366	113	132
114	114	3417	4577	4284	114	3039	3571	131	5367	114	133
115	115	3418	4578	4285	115	3039	3572	132	5368	115	134
116	116	3419	4579	4286	116	3039	3573	133	5369	116	135
117	117	3420	4580	4287	117	3040	3574	134	5370	117	136
118	118	3421	4581	4288	118	3041	3575	135	5371	118	137
119	119	3422	4582	4289	119	3042	3576	136	5372	119	138
120	120	3423	4583	4290	120	3042	3577	137	5373	120	139
121	121	3424	4584	4291	121	3043	3578	138	5374	121	140
122	122	3425	4585	4292	122	3044	3579	139	5375	122	141
123	123	3426	4586	4293	123	3045	3580	140	5376	123	142
124	124	3427	4587	4294	124	3046	3581	141	5377	124	143
125	125	3428	4588	4295	125	3046	3582	142	5378	125	144
126	126	3429	4589	4296	126	3047	3583	143	5379	126	145
127	127	3430	4590	4297	127	3047	3584	144	5380	127	146
128	128	3431	4591	4298	128	3047	3585	145	5381	128	147
129	129	3432	4592	4299	129	3048	3586	146	5382	129	148
130	130	3433	4593	4300	130	3049	3587	147	5383	130	149
131	131	3434	4594	4301	131	3050	3588	148	5384	131	150
132	132	3435	4595	4302	132	3051	3589	149	5385	132	151
133	133	3436	4596	4303	133	3051	3590	150	5386	133	152
134	134	3437	4597	4304	134	3051	3591	151	5387	134	153
135	135	3438	4598	4305	135	3052	3592	152	5388	135	154
136	136	3439	4599	4306	136	3053	3593	153	5389	136	155
137	137	3440	4600	4307	137	3054	3594	154	5390	137	156
138	138	3441	4601	4308	138	3055	3595	154-155	5391	138	157
139	139	3442	4602	4309	139	3056	3596	156	5392	139	158
140	140	3443	4603	4310	140	3056	3597	157	5393	140	159
141	141	3444	4604	4311	141	3056	3598	158	5394	141	160
142	142	3445	4605	4312	142	3057	3599	159	5395	142	161
143	143	3446	4606	4313	143	3058	3600	160	5396	143	162
144	144	3447	4607	4314	144	3059	3601	161	5397	144	163
145	145	3448	4608	4315	145	3060	3602	162	5398	145	164
146	146	3449	4609	4316	146	3061	3603	163	5399	146	165
147	147	3450	4610	4317	147	3062	3604	164	5400	147	166
148	148	3451	4611	4318	148	3062	3605	165	5401	148	167
149	149	3452	4612	4319	149	3063	3606	166	5402	149	168
150	150	3453	4613	4320	150	3063	3607	167	5403	150	169
151	151	3454	4614	4321	151	3064	3608	168	5404	151	170
152	152	3455	4615	4322	152	3065	3609	169	5405	152	171

N. L. L. NUMBERING.	ALABAMA—Laws 1909. P. 126.	ARIZONA—Rev. St. 1901. tit. 49.	COLORADO—Rev. St. 1908, ch. 95.	CONNECTICUT—Gen. St. 1903, tit. 33, ch. 234.	DIST. OF COLUMBIA— U. S. Stat. Vol. 30, p. 785 (D. C. Code, ch. 46).	FLORIDA—Gen. St. 1906, 4th Div., tit. 5, ch. 2.	IDAHO—Rev. Codes 1908, tit. 12, p. 1226.	ILLINOIS—Rev. St. 1911, ch. 98.	KANSAS—Gen. St. 1909, ch. 34.	KENTUCKY—St. 1909 (Carroll) Ch. 90B, § 3720b.	MARYLAND—Ann. Civ. Code 1910, art. 18.
153	153	3456	4616	4823	153	3066	3610	170	5406	153	172
154	154	3457	4617	4824	154	3066	3611	171	5407	154	173
155	155	3458	4618	4325	155	3067	3612	172	5408	155	174
156	156	3459	4619	4826	156	3067	3613	173	5409	156	175
157	157	3460	4620	4327	157	3068	3614	174	5410	157	176
158	158	3461	4621	4828	158	3069	3615	175	5411	158	177
159	159	3462	4622	4329	159	3070	3616	176	5412	159	178
160	160	3463	4623	4330	160	3071	3617	177	5413	160	179
161	161	3464	4624	4331	161	3073	3618	178	5414	161	180
162	162	3465	4625	4332	162	3074	3619	179	5415	162	181
163	163	3466	4626	4333	163	3075	3620	180	5416	163	182
164	164	3467	4627	4334	164	3076	3621	181	5417	164	183
165	165	3468	4628	4335	165	3076	3622	182	5418	165	184
166	166	3469	4629	4336	166	3077	3623	183	5419	166	185
167	167	3470	4630	4337	167	3078	3624	184	5420	167	186
168	168	3471	4631	4338	168	3079	3625	185	5421	168	187
169	169	3472	4632	4339	169	3080	3626	186	5422	169	188
170	170	3473	4633	4340	170	3081	3627	187	5423	170	189
171	171	3474	4634	4341	171	3082	3628	188	5424	171	190
172	172	3475	4635	4342	172	3082	3629	189	5425	172	191
173	173	3476	4636	4343	173	3083	3630	190	5426	173	192
174	174	3477	4637	4344	174	3084	3631	191	5427	174	193
175	175	3478	4638	4345	175	3085	3632	192	5428	175	194
176	176	3479	4639	4346	176	3086	3633	193	5429	176	195
177	177	3480	4640	4347	177	3086	3634	194	5430	177	196
178	178	3481	4641	4348	178	3087	3635	195	5431	178	197
179	179	3482	4642	4349	179	3088	3636	196	5432	179	198
180	180	3483	4643	4350	180	3089	3637	197	5433	180	199
181	181	3484	4644	4351	181	3090	3638	198	5434	181	200
182	182	3485	4645	4352	182	3091	3639	199	5435	182	201
183	183	3486	4646	4353	183	3092	3640	200	5436	183	202
184	184	—	4647	4354	184	3093	3641	201	5437	184	203
185	185	—	4648	4355	185	3094	3642	202	5438	185	204
186	186	—	4649	4356	186	3095	3643	203	5439	186	205
187	187	—	4650	4357	187	3096	3644	204	5440	187	206
188	188	—	4651	4358	188	3097	3645	205	5441	188	207
189	189	—	4652	4359	189	3098	3646	206	5442	189	208
190	190	—	4653	—	—	2934	3647	207	5247	—	13
191	191	3487	4654	4170	—	2934	3648	208	5248	190	14
192	192	3488	4655	4170	—	2934	3649	209	5249	191	15
193	193	3489	4656	4170	*	2934	3650	210	5250	192	16
194	194	3490	4657	4170	*	2934	3651	211	5251	193	17
195	195	—	4658	4170	—	—	3652	212	5252	194	18
196	196	3491	4659	4170	—	2934	3653	213	5253	—	19
197	198	—	—	—	190	—	—	214	—	195	19
198	197	—	—	—	191	—	—	—	—	—	—

* General introduction.

N. I. L. NUMBERING.		MASSACHUSETTS—Rev. Laws 1902, ch. 72.		MICHIGAN—Pub. Acts 1906, Act 265.		MISSOURI—Rev. St. 1909, ch. 86, p. 3122.		MONTANA—Civ. Code 1907, tit. 15, p. 1892.		NEBRASKA—Rev. St. 1918, ch. 54.		NEVADA—Rev. Laws 1912, Vol. 1, p. 765.		NEW HAMPSHIRE— Laws 1909, ch. 122.		NEW YORK—Consol. Laws, ch. 28.		NORTH CAROLINA— Rev. 1905, ch. 54.		NORTH DAKOTA—Rev. Codes 1905 (Civ. Code) ch. 90.	
1	18	3	9972	5849	5319	2548		1	20			1	20			2151	6308				
2	19	4	9973	5850	5320	2549		2	21			2	21			2152	6304				
3	20	5	9974	5851	5321	2550		3	22			3	22			2153	6305				
4	21	6	9975	5852	5322	2551		4	23			4	23			2156	6306				
5	22	7	9976	5853	5323	2552		5	24			5	24			2154	6307				
6	23	8	9977	5854	5324	2553		6	25			6	25			2155	6308				
7	24	9	9978	5855	5325	2554		7	26			7	26			2157	6309				
8	25	10	9979	5856	5326	2555		8	27			8	27			2158	6310				
9	26	11	9980	5857	5327	2556		9	28			9	28			2159	6311				
10	27	12	9981	5858	5328	2557		10	29			10	29			2160	6312				
11	28	13	9982	5859	5329	2558		11	30			11	30			2161	6313				
12	29	14	9983	5860	5330	2559		12	31			12	31			2162	6314				
13	30	15	9984	5861	5331	2560		13	32			13	32			2163	6315				
14	31	16	9985	5862	5332	2561		14	33			14	33			2164	6316				
15	32	17	9986	5863	5333	2562		15	34			15	34			2165	6317				
16	33	18	9987	5864	5334	2563		16	35			16	35			2166	6318				
17	34	19	9988	5865	5335	2564		17	36			17	36			2341	6319				
18	35	20	9989	5866	5336	2565		18	37			18	37			2167	6320				
19	36	21	9990	5867	5337	2566		19	38			19	38			2168	6321				
20	37	22	9991	5868	5338	2567		20	39			20	39			2169	6322				
21	38	23	9992	5869	5339	2568		21	40			21	40			2170	6323				
22	39	24	9993	5870	5340	2569		22	41			22	41			2180	6324				
23	40	25	9994	5871	5341	2570		23	42			23	42			2171	6325				
24	41	26	9995	5872	5342	2571		24	50			24	50			2172	6326				
25	42	27	9996	5873	5343	2572		25	51			25	51			2173	6327				
26	43	28	9997	5874	5344	2573		26	52			26	52			2174	6328				
27	44	29	9998	5875	5345	2574		27	53			27	53			2175	6329				
28	45	30	9999	5876	5346	2575		28	54			28	54			2176	6330				
29	46	31	10000	5877	5347	2576		29	55			29	55			2177	6331				
30	47	32	10001	5878	5348	2577		30	60			30	60			2178	6332				
31	48	33	10002	5879	5349	2578		31	61			31	61			2179	6333				
32	49	34	10003	5880	5350	2579		32	62			32	62			2181	6334				
33	50	35	10004	5881	5351	2580		33	63			33	63			2182	6335				
34	51	36	10004	5882	5352	2581		34	64			34	64			2183	6336				
35	52	37	10005	5883	5353	2582		35	65			35	65			2184	6337				
36	53	38	10006	5884	5354	2583		36	66			36	66			2185	6338				
37	54	39	10007	5885	5355	2584		37	67			37	67			2186	6339				
38	55	40	10008	5886	5356	2585		38	68			38	68			2187	6340				
39	56	41	10009	5887	5357	2586		39	69			39	69			2188	6341				
40	57	42	10010	5888	5358	2587		40	70			40	70			2189	6342				
41	58	43	10011	5889	5359	2588		41	71			41	71			2190	6343				
42	59	44	10012	5890	5360	2589		42	72			42	72			2191	6344				
43	60	45	10013	5891	5361	2590		43	73			43	73			2192	6345				
44	61	46	10014	5892	5362	2591		44	74			44	74			2193	6346				
45	62	47	10015	5893	5363	2592		45	75			45	75			2194	6347				
46	63	48	10016	5894	5364	2593		46	76			46	76			2195	6348				
47	64	49	10017	5895	5365	2594		47	77			47	77			2196	6349				
48	65	50	10018	5896	5366	2595		48	78			48	78			2197	6350				
49	66	51	10019	5897	5367	2596		49	79			49	79			2198	6351				
50	67	52	10020	5898	5368	2597		50	80			50	80			2199	6352				

N. L. L. NUMBERING.		MASSACHUSETTS—Rev. Laws 1902, ch. 73.		MICHIGAN—Pub. Acts 1905, Act 265.		MISSOURI—Rev. St. 1900. ch. 86, p. 3122.		MONTANA—Civ. Code 1907, tit. 16, p. 1693.		NEBRASKA—Rev. St. 1912, ch. 54.		NEVADA—Rev. Laws 1912, Vol. I, p. 76.		NEW HAMPSHIRE— Laws 1909, ch. 121.		NEW YORK—Consl. Laws, ch. 38.		NORTH CAROLINA— Rev. 1905, ch. 54.		NORTH DAKOTA—Rev. Codes 1905 (Civ. Code) ch. 90.	
51	68	53	10021	5899	5369	2598	51	90	2200	6353											
52	69	54	10022	5900	5370	2599	52	91	2201	6354											
53	70	55	10023	5901	5371	2600	53	92	2202	6355											
54	71	56	10024	5902	5372	2601	54	93	2203	6356											
55	72	57	10025	5903	5373	2602	55	94	2204	6357											
56	73	58	10026	5904	5374	2603	56	95	2205	6358											
57	74	59	10027	5905	5375	2604	57	96	2206	6359											
58	75	60	10028	5906	5376	2605	58	97	2207	6360											
59	76	61	10029	5907	5377	2606	59	98	2208	6361											
60	77	62	10030	5908	5378	2607	60	110	2209	6362											
61	78	63	10031	5909	5379	2608	61	111	2210	6363											
62	79	64	10032	5910	5380	2609	62	112	2211	6364											
63	80	65	10033	5911	5381	2610	63	113	2212	6365											
64	81	66	10034	5912	5382	2611	64	114	2213	6366											
65	82	67	10035	5913	5383	2612	65	115	2214	6367											
66	83	68	10036	5914	5384	2613	66	116	2215	6368											
67	84	69	10037	5915	5385	2614	67	117	2216	6369											
68	85	70	10038	5916	5386	2615	68	118	2217	6370											
69	86	71	10039	5917	5387	2616	69	119	2218	6371											
70	87	72	10040	5918	5388	2617	70	130	2219	6372											
71	88	73	10041	5919	5389	2618	71	131	2220	6373											
72	89	74	10042	5920	5390	2619	72	132	2221	6374											
73	90	75	10043	5921	5391	2620	73	133	2222	6375											
74	91	76	10044	5922	5392	2621	74	134	2223	6376											
75	92	77	10045	5923	5393	2622	75	135	2224	6377											
76	93	78	10046	5924	5394	2623	76	136	2225	6378											
77	94	79	10047	5925	5395	2624	77	137	2226	6379											
78	95	80	10048	5926	5396	2625	78	138	2227	6380											
79	96	81	10049	5927	5397	2626	79	139	2228	6381											
80	97	82	10050	5928	5398	2627	80	140	2229	6382											
81	98	83	10051	5929	5399	2628	81	141	2230	6383											
82	99	84	10052	5930	5400	2629	82	142	2231	6384											
83	100	85	10053	5931	5401	2630	83	143	2232	6385											
84	101	86	10054	5932	5402	2631	84	144	2233	6386											
85	102	87	10055	5933	5403	2632	85	145	2234	6387											
86	103	88	10056	5934	5404	2633	86	146	2235	6388											
87	104	89	10057	5935	—	2634	87	147	2237	6389											
88	105	90	10058	5936	5405	2635	88	148	2238	6390											
89	106	91	10059	5937	5406	2636	89	160	2239	6391											
90	107	92	10060	5938	5407	2637	90	161	2240	6392											
91	108	93	10061	5939	5408	2638	91	162	2241	6393											
92	109	94	10062	5940	5409	2639	92	163	2242	6394											
93	110	95	10063	5941	5410	2640	93	164	2243	6395											
94	111	96	10064	5942	5411	2641	94	165	2244	6396											
95	112	97	10065	5943	5412	2642	95	166	2245	6397											
96	113	98	10066	5944	5413	2643	96	167	2246	6398											
97	114	99	10067	5945	5414	2644	97	168	2247	6399											
98	115	100	10068	5946	5415	2645	98	169	2248	6400											
99	116	101	10069	5947	5416	2646	99	170	2249	6401											
100	117	102	10070	5948	5417	2647	100	171	2250	6402											

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101	118	103	10071	5949	5418	2648	101	172	2251	6408
102	119	104	10072	5950	5419	2649	102	173	2252	6404
103	120	105	10073	5951	5420	2650	103	174	2253	6405
104	121	106	10074	5952	5421	2651	104	175	2254	6406
105	122	107	10075	5953	5422	2652	105	176	2255	6407
106	123	108	10076	5954	5423	2653	106	177	2256	6408
107	124	109	10077	5955	5424	2654	107	178	2257	6409
108	125	110	10078	5956	5425	2655	108	179	2258	6410
109	126	111	10079	5957	5426	2656	109	180	2259	6411
110	127	112	10080	5958	5427	2657	110	181	2260	6412
111	128	113	10081	5959	5428	2658	111	182	2261	6413
112	129	114	10082	5960	5429	2659	112	183	2262	6414
113	130	115	10083	5961	5430	2660	113	184	2263	6415
114	131	116	10084	5962	5431	2661	114	185	2264	6416
115	132	117	10085	5963	5432	2662	115	186	2265	6417
116	133	118	10086	5964	5433	2663	116	187	2266	6418
117	134	119	10087	5965	5434	2664	117	188	2267	6419
118	135	120	10088	5966	5435	2665	118	189	2268	6420
119	136	121	10089	5967	5436	2666	119	200	2269	6421
120	137	122	10090	5968	5437	2667	120	201	2270	6422
121	138	123	10091	5969	5438	2668	121	202	2271	6423
122	139	124	10092	5970	5439	2669	122	203	2272	6424
123	140	125	10093	5971	5440	2670	123	204	2273	6425
124	141	126	10094	5972	5441	2671	124	205	2274	6426
125	142	127	10095	5973	5442	2672	125	206	2275	6427
126	143	128	10096	5974	5443	2673	126	210	2276	6428
127	144	129	10097	5975	5444	2674	127	211	2277	6429
128	145	130	10098	5976	5445	2675	128	212	2278	6430
129	146	131	10099	5977	5446	2676	129	213	2279	6431
130	147	132	10100	5978	5447	2677	130	214	2280	6432
131	148	133	10101	5979	5448	2678	131	215	2281	6433
132	149	134	10102	5980	5449	2679	132	220	2282	6434
133	150	135	10103	5981	5450	2680	133	221	2283	6435
134	151	136	10104	5982	5451	2681	134	222	2284	6436
135	152	137	10105	5983	5452	2682	135	223	2285	6437
136	153	138	10106	5984	5453	2683	136	224	2286	6438
137	154	139	10107	5985	5454	2684	137	225	2287	6439
138	155	140	10108	5986	5455	2685	138	226	2288	6440
139	156	141	10109	5987	5456	2686	139	227	2289	6441
140	157	142	10110	5988	5457	2687	140	228	2290	6442
141	158	143	10111	5989	5458	2688	141	229	2291	6443
142	159	144	10112	5990	5459	2689	142	230	2292	6444
143	160	145	10113	5991	5460	2690	143	240	2293	6445
144	161	146	10114	5992	5461	2691	144	241	2294	6446
145	162	147	10115	5993	5462	2692	145	242	2295	6447
146	163	148	10116	5994	5463	2693	146	243	2296	6448
147	164	149	10117	5995	5464	2694	147	244	2297	6449
148	165	150	10118	5996	5465	2695	148	245	2298	6450
149	166	151	10119	5997	5466	2696	149	246	2299	6451

APPENDIX

N. L. L. NUMBERING.	MASSACHUSETTS—Rev. Laws 1802, ch. 75.	MICHIGAN—Pub. Acts 1805, Act 265.	MISSOURI—Rev. St. 1809, ch. 86, P. 3122.	MONTANA—Civ. Code 1807, tit. 15, p. 1682.	NEBRASKA—Rev. St. 1812, ch. 54.	NEVADA—Rev. Laws 1912, Vol. 1, p. 769.	NEW HAMPSHIRE— Laws 1809, ch. 123.	NEW YORK—Consol. Laws, ch. 35.	NORTH CAROLINA— Rev. 1805, ch. 54.	NORTH DAKOTA—Rev. Ch. 90 Code 1905 (Civ. Code)
150	167	152	10120	5998	5467	2697	150	247	2300	6452
151	168	153	10121	5999	5468	2698	151	248	2301	6453
152	169	154	10122	6000	5469	2699	152	260	2302	6454
153	170	155	10123	6001	5470	2700	153	261	2303	6455
154	171	156	10124	6002	5471	2701	154	262	2304	6456
155	172	157	10125	6003	5472	2702	155	263	2305	6457
156	173	158	10126	6004	5473	2703	156	264	2306	6458
157	174	159	10127	6005	5474	2704	157	265	2307	6459
158	175	160	10128	6006	5475	2705	158	266	2308	6460
159	176	161	10129	6007	5476	2706	159	267	2309	6461
160	177	162	10130	6008	5477	2707	160	268	2310	6462
161	178	163	10131	6009	5478	2708	161	280	2311	6463
162	179	164	10132	6010	5479	2709	162	281	2312	6464
163	180	165	10133	6011	5480	2710	163	282	2313	6465
164	181	166	10134	6012	5481	2711	164	283	2314	6466
165	182	167	10135	6013	5482	2712	165	284	2315	6467
166	183	168	10136	6014	5483	2713	166	285	2316	6468
167	184	169	10137	6015	5484	2714	167	286	2317	6467
168	185	170	10138	6016	5485	2715	168	287	2318	6470
169	186	171	10139	6017	5486	2716	169	288	2319	6471
170	187	172	10140	6018	5487	2717	170	289	2320	6472
171	188	173	10141	6019	5488	2718	171	300	2321	6473
172	189	174	10142	6020	5489	2719	172	301	2322	6474
173	190	175	10143	6021	5490	2720	173	302	2323	6475
174	191	176	10144	6022	5491	2721	174	303	2324	6476
175	192	177	10145	6023	5492	2722	175	304	2325	6477
176	193	178	10146	6024	5493	2723	176	305	2326	6478
177	194	179	10147	6025	5494	2724	177	306	2327	6479
178	195	180	10148	6026	5495	2725	178	310	2328	6480
179	196	181	10149	6027	5496	2726	179	311	2329	6481
180	197	182	10150	6028	5497	2727	180	312	2330	6482
181	198	183	10151	6029	5498	2728	181	313	2331	6483
182	199	184	10152	6030	5499	2729	182	314	2332	6484
183	200	185	10153	6031	5500	2730	183	315	2333	6485
184	201	186	10154	6032	5501	2731	184	320	2334	6486
185	202	187	10155	6033	5502	2732	185	321	2335	6487
186	203	188	10156	6034	5503	2733	186	322	2336	6488
187	204	189	10157	6035	5504	2734	187	323	2337	6489
188	205	190	10158	6036	5505	2735	188	324	2338	6490
189	206	191	10159	6037	5506	2736	189	325	2339	6491
190	—	1	9971	5842	—	2737	—	1	—	6492
191	207	2	10160	5843	5507	2738	190	2	2340	6493
192	208	2	10161	5844	5508	2739	191	3	2342	6494
193	209	2	10162	5845	5509	2740	192	4	2343	6495
194	210	2	10163	5846	5510	2741	193	5	—	6496
195	211	2	10164	5847	—	2742	194	6	2345	6497
196	212	2	10165	5848	5511	2743	195	7	2344	6498
197	—	—	—	—	—	—	196	340	—	—
198	—	—	—	—	—	—	196	341	—	—

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1	8106	OHIO—Gen. Laws 1910, Pt. 2, tit. 7, Div. 2, P. 1717.	4051	OREGON—Gen. Laws 1910 (L. O. L.) tit. 40, ch. 2, p. 2128.	5834	RHOADES, ISLAND—Gen. Laws 1909, tit. 19, ch. 200.	7	SOUTH DAKOTA—Comp. Law 1913, Vol. 2, p. 298.	1	1553	3392	1675-1	3159
2	8107	OKLAHOMA—Rev. Laws 1910, ch. 49.	4052	5835	8	RHODE ISLAND—Gen. Laws 1909, tit. 19, ch. 200.	9	TENNESSEE—Code Suppl. 1897-1909, p. 671.	2	1554	3393	1675-2	3160
3	8108		4053	5836			10		3	1555	3394	1675-3	3161
4	8109		4054	5837	4		11		4	1556	3395	1675-4	3162
5	8110		4055	5838	5		12		5	1557	3396	1675-5	3163
6	8111		4056	5839	6		13		6	1558	3397	1675-6	3164
7	8112		4057	5840	7		14		7	1559	3398	1675-7	3165
8	8113		4058	5841	8		15		8	1560	3399	1675-8	3166
9	8114		4059	5842	9		16		9	1561	3400	1675-9	3167
10	8115		4060	5843	10		17		10	1562	3401	1675-10	3168
11	8116		4061	5844	11		18		11	1563	3402	1675-11	3169
12	8117		4062	5845	12		19		12	1564	3403	1675-12	3170
13	8118		4063	5846	13		20		13	1565	3404	1675-13	3171
14	8119		4064	5847	14		21		14	1566	3405	1675-14	3172
15	8120		4065	5848	15		22		15	1567	3406	1675-15	3173
16	8121		4066	5849	16		23		16	1568	3407	1675-16	3174
17	8122		4067	5850	17		24		17	1569	3408	1675-17	3175
18	8123		4068	5851	18		25		18	1570	3409	1675-18	3176
19	8124		4069	5852	19		26		19	1571	3410	1675-19	3177
20	8125		4070	5853	20		27		20	1572	3411	1675-20	3178
21	8126		4071	5854	21		28		21	1573	3412	1675-21	3179
22	8127		4072	5855	22		29		22	1574	3413	1675-22	3180
23	8128		4073	5856	30		31		23	1575	3414	1675-23	3181
24	8129		4074	5857	31		32		24	1576	3415	1675-50	3182
25	8130		4075	5858	32		33		25	1577	3416	1675-51	3183
26	8131		4076	5859	33		34		26	1578	3417	1675-52	3184
27	8132		4077	5860	35		35		27	1579	3418	1675-53	3185
28	8133		4078	5861	36		36		28	1580	3419	1675-54	3186
29	8134		4079	5862	37		37		29	1581	3420	1675-55	3187
30	8135		4080	5863	38		38		30	1582	3421	1676	3188
31	8136		4081	5864	39		39		31	1583	3422	1676-1	3189
32	8137		4082	5865	40		40		32	1584	3423	1676-2	3190
33	8138		4083	5866	41		41		33	1585	3424	1676-3	3191
34	8139		4084	5867	42		42		34	1586	3425	1676-4	3192
35	8140		4085	5868	43		43		35	1587	3426	1676-5	3193
36	8141		4086	5869	44		44		36	1588	3427	1676-6	3194
37	8142		4087	5870	45		45		37	1589	3428	1676-7	3195
38	8143		4088	5871	46		46		38	1590	3429	1676-8	3196
39	8144		4089	5872	47		47		39	1591	3430	1676-9	3197
40	8145		4090	5873	48		48		40	1592	3431	1676-10	3198
41	8146		4091	5874	49		49		41	1593	3432	1676-11	3199
42	8147		4092	5875	50		50		42	1594	3433	1676-12	3200
43	8148		4093	5876	51		51		43	1595	3434	1676-13	3201
44	8149		4094	5877	52		52		44	1596	3435	1676-14	3202
45	8150		4095	5878	53		53		45	1597	3436	1676-15	3203
46	8151		4096	5879	54		54		46	1598	3437	1676-16	3204
47	8152		4097	5880	55		55		47	1599	3438	1676-17	3205
48	8153		4098	5881	56		56		48	1600	3439	1676-18	3206
49	8154		4099	5882	57		57		49	1601	3440	1676-19	3207
50	8155		4100	5883	58		58		50	1602	3441	1676-20	3208

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51	8156	4101	5884	57	51	1603	3442	1676-21	3209
52	8157	4102	5885	58	52	1604	3443	1676-22	3210
53	8158	4103	5886	59	53	1605	3444	1676-23	3211
54	8159	4104	5887	60	54	1606	3445	1676-24	3212
55	8160	4105	5888	61	55	1607	3446	1676-25	3213
56	8161	4106	5889	62	56	1608	3447	1676-26	3214
57	8162	4107	5890	63	57	1609	3448	1676-27	3215
58	8163	4108	5891	64	58	1610	3449	1676-28	3216
59	8164	4109	5892	65	59	1611	3450	1676-29	3217
60	8165	4110	5893	66	60	1612	3451	1677	3218
61	8166	4111	5894	67	61	1613	3452	1677-1	3219
62	8167	4112	5895	68	62	1614	3453	1677-2	3220
63	8168	4113	5896	69	63	1615	3454	1677-3	3221
64	8169	4114	5897	70	64	1616	3455	1677-4	3222
65	8170	4115	5898	71	65	1617	3456	1677-5	3223
66	8171	4116	5899	72	66	1618	3457	1677-6	3224
67	8172	4117	5900	73	67	1619	3458	1677-7	3225
68	8173	4118	5901	74	68	1620	3459	1677-8	3226
69	8174	4119	5902	75	69	1621	3460	1677-9	3227
70	8175	4120	5903	76	70	1622	3461	1678	3228
71	8176	4121	5904	77	71	1623	3462	1678-1	3229
72	8177	4122	5905	78	72	1624	3463	1678-2	3230
73	8178	4123	5906	79	73	1625	3464	1678-3	3231
74	8179	4124	5907	80	74	1626	3465	1678-4	3232
75	8180	4125	5908	81	75	1627	3466	1678-5	3233
76	8181	4126	5909	82	76	1628	3467	1678-6	3234
77	8182	4127	5910	83	77	1629	3468	1678-7	3235
78	8183	4128	5911	84	78	1630	3469	1678-8	3236
79	8184	4129	5912	85	79	1631	3470	1678-9	3237
80	8185	4130	5913	86	80	1632	3471	1678-10	3238
81	8186	4131	5914	87	81	1633	3472	1678-11	3239
82	8187	4132	5915	88	82	1634	3473	1678-12	3240
83	8188	4133	5916	89	83	1635	3474	1678-13	3241
84	8189	4134	5917	90	84	1636	3475	1678-14	3242
85	8190	4135	5918	91	85	1637	3475½	1678-15	3243
86	8191	4136	5919	92	86	1638	3476	1678-16	3244
87	8192	4137	5920	93	—	1639	3477	1678-17	3245
88	8193	4138	5921	94	87	1640	3478	1678-18	3246
89	8194	4139	5922	95	88	1641	3479	1678-19	3247
90	8195	4140	5923	96	89	1642	3480	1678-20	3248
91	8196	4141	5924	97	90	1643	3481	1678-21	3249
92	8197	4142	5925	98	91	1644	3482	1678-22	3250
93	8198	4143	5926	99	92	1645	3483	1678-23	3251
94	8199	4144	5927	100	93	1646	3484	1678-24	3252
95	8200	4145	5928	101	94	1647	3485	1678-25	3253
96	8201	4146	5929	102	95	1648	3486	1678-26	3254
97	8202	4147	5930	103	96	1649	3487	1678-27	3255
98	8203	4148	5931	104	97	1650	3488	1678-28	3256
99	8204	4149	5932	105	98	1651	3489	1678-29	3257
100	8205	4150	5933	106	99	1652	3490	1678-30	3258

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101	8206	4151	5934	107	100	101	1053	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818	819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837	838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856	857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873	874	875	876	877	878	879	880	881	882	883	884	885	886	887	888	889	890	891	892	893	894	895	896	897	898	899	900	901	902	903	904	905	906	907	908	909	910	911	912	913	914	915	916	917	918	919	920	921	922	923	924	925	926	927	928	929	930	931	932	933	934	935	936	937	938	939	940	941	942	943	944	945	946	947	948	949	950	951	952	953	954	955	956	957	958	959	960	961	962	963	964	965	966	967	968	969	970	971	972	973	974	975	976	977	978	979	980	981	982	983	984	985	986	987	988	989	990	991	992	993	994	995	996	997	998	999	1000	1001	1002	1003	1004	1005	1006	1007	1008	1009	1010	1011	1012	1013	1014	1015	1016	1017	1018	1019	1020	1021	1022	1023	1024	1025	1026	1027	1028	1029	1030	1031	1032	1033	1034	1035	1036	1037	1038	1039	1040	1041	1042	1043	1044	1045	1046	1047	1048	1049	1050	1051	1052	1053	1054	1055	1056	1057	1058	1059	1060	1061	1062	1063	1064	1065	1066	1067	1068	1069	1070	1071	1072	1073	1074	1075	1076	1077	1078	1079	1080	1081	1082	1083	1084	1085	1086	1087	1088	1089	1090	1091	1092	1093	1094	1095	1096	1097	1098	1099	1100	1101	1102	1103	1104	1105	1106	1107	1108	1109	1110	1111	1112	1113	1114	1115	1116	1117	1118	1119	1120	1121	1122	1123	1124	1125	1126	1127	1128	1129	1130	1131	1132	1133	1134	1135	1136	1137	1138	1139	1140	1141	1142	1143	1144	1145	1146	1147	1148	1149	1150	1151	1152	1153	1154	1155	1156	1157	1158	1159	1160	1161	1162	1163	1164	1165	1166	1167	1168	1169	1170	1171	1172	1173	1174	1175	1176	1177	1178	1179	1180	1181	1182	1183	1184	1185	1186	1187	1188	1189	1190	1191	1192	1193	1194	1195	1196	1197	1198	1199	1200	1201	1202	1203	1204	1205	1206	1207	1208	1209	1210	1211	1212	1213	1214	1215	1216	1217	1218	1219	1220	1221	1222	1223	1224	1225	1226	1227	1228	1229	1230	1231	1232	1233	1234	1235	1236	1237	1238	1239	1240	1241	1242	1243	1244	1245	1246	1247	1248	1249	1250	1251	1252	1253	1254	1255	1256	1257	1258	1259	1260	1261	1262	1263	1264	1265	1266	1267	1268	1269	1270	1271	1272	127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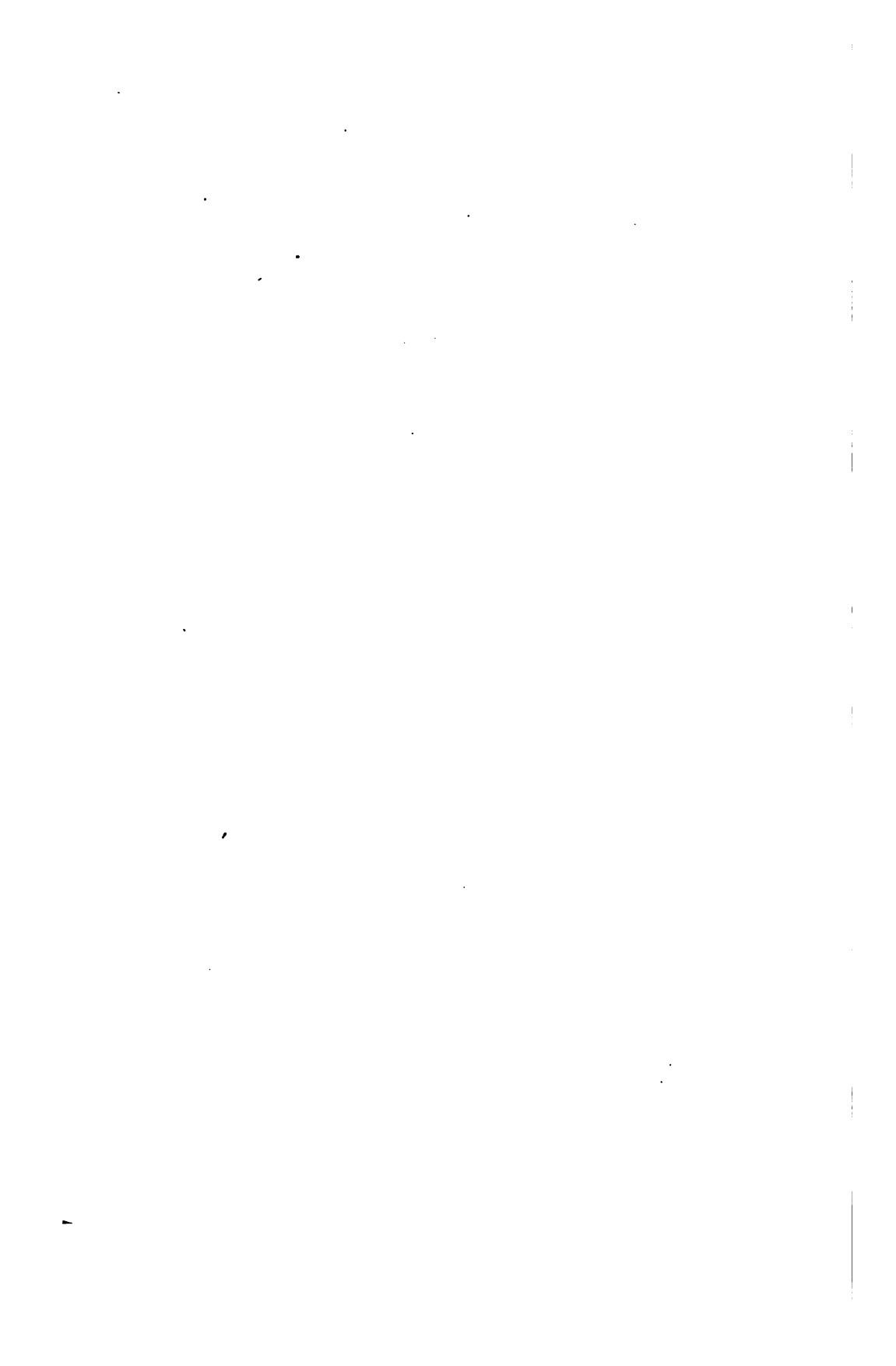
N. L. L. NUMBERING.		OHIO—Gen. Code 1910. Pt. 2, tit. 7, Div. 2, p. 1717.		OKLAHOMA—Rev. Laws 1910, ch. 49.		OREGON—Gen. Law 1910 (L. O. L.) tit. 2, p. 2128.		RHODE ISLAND—Gen. Laws 1909, tit. 19, ch. 200.		SOUTH DAKOTA—Comp. Laws 1913, Vol. 2, p. 298.		UTAH—Comp. Laws 1907, tit. 63, p. 629.		WASHINGTON—Rem. & Bal. Code 1910, tit. 19, ch. 3.		WISCONSIN—St. 1913, ch. 78.		WYOMING—Comp. 1910, ch. 210.	
151	8256	4201	5984	157	149	151	1665×37	3541	1681-8	3309									
152	8257	4202	5985	158	150	152	1665×38	3542	1681-9	3310									
153	8258	4203	5986	159	151	153	1665×39	3543	1681-10	3311									
164	8259	4204	5987	160	152	154	1665×40	3544	1681-11	3312									
155	8260	4205	5988	161	153	155	1665×41	3545	1681-12	3313									
156	8261	4206	5989	162	154	156	1665×42	3546	1681-13	3314									
157	8262	4207	5990	163	155	157	1665×43	3547	1681-14	3315									
158	8263	4208	5991	164	156	158	1665×44	3548	1681-15	3316									
159	8264	4209	5992	165	157	159	1665×45	3549	1681-16	3317									
160	8265	4210	5993	166	158	160	1665×46	3550	1681-17	3318									
161	8266	4211	5994	167	159	161	1665×47	3551	1681-18	3319									
162	8267	4212	5995	168	160	162	1665×48	3552	1681-19	3320									
163	8268	4213	5996	169	161	163	1665×49	3553	1681-20	3321									
164	8269	4214	5997	170	162	164	1665×50	3554	1681-21	3322									
165	8270	4215	5998	171	163	165	1665×51	3555	1681-22	3323									
166	8271	4216	5999	172	164	166	1665×52	3556	1681-23	3324									
167	8272	4217	6000	173	165	167	1665×53	3557	1681-24	3325									
168	8273	4218	6001	174	166	168	1665×54	3558	1681-25	3326									
169	8274	4219	6002	175	167	169	1665×55	3559	1681-26	3327									
170	8275	4220	6003	176	168	170	1665×56	3560	1681-27	3328									
171	8276	4221	6004	177	169	171	1665×57	3561	1681-28	3329									
172	8277	4222	6005	178	170	172	1665×58	3562	1681-29	3330									
173	8278	4223	6006	179	171	173	1665×59	3563	1681-30	3331									
174	8279	4224	6007	180	172	174	1665×60	3564	1681-31	3332									
175	8280	4225	6008	181	173	175	1665×61	3565	1681-32	3333									
176	8281	4226	6009	182	174	176	1665×62	3566	1681-33	3334									
177	8282	4227	6010	183	175	177	1665×63	3567	1681-34	3335									
178	8283	4228	6011	184	176	178	1665×64	3568	1681-35	3336									
179	8284	4229	6012	185	177	179	1665×65	3569	1681-36	3337									
180	8285	4230	6013	186	178	180	1665×66	3570	1681-37	3338									
181	8286	4231	6014	187	179	181	1665×67	3571	1681-38	3339									
182	8287	4232	6015	188	180	182	1665×68	3572	1681-39	3340									
183	8288	4233	6016	189	181	183	1665×69	3573	1681-40	3341									
184	8289	4234	6017	190	182	184	1665×70	3574	1684	3342									
185	8290	4235	6018	191	183	185	1665×71	3575	1684-1	3343									
186	8291	4236	6019	192	184	186	1665×72	3576	1684-2	3344									
187	8292	4237	6020	193	185	187	1665×73	3577	1684-3	3345									
188	8293	4238	6021	194	186	188	1665×74	3578	1684-4	3346									
189	8294	4239	6022	195	187	189	1665×75	3579	1684-5	3347									
190	—	4044	6023	—	188	—	1665×76	3580	—	3348									
191	8295	4045	6023	1	189	—	1665×77	3581	1675	3349									
192	8296	4046	6023	2	190	—	1665×78	3582	1675	3350									
193	8297	4047	6023	3	191	—	1665×79	3583	1675	3351									
194	8298	4048	6023	4	192	—	1665×80	3584	1675	3352									
195	8299	4049	6024	5	193	—	1665×81	3585	1675	3353									
196	8300	4050	6025	6	194	—	1665×82	3586	1675	3354									
197	—	—	—	—	—	190	—	—	—	—	—	—	—	1684-7	—	—	—	—	—
198	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—

* Not numbered in General Introduction.

STATES, ETC., WITH SECTION NUMBERING SAME AS N. I. L.

ALASKA	NEW JERSEY
Laws 1918, ch. 64.	Comp. St. 1910, vol. 2, p. 3732.
ARKANSAS	NEW MEXICO
Laws 1918, Act 81.	Laws 1907, ch. 83.
DELAWARE	PENNSYLVANIA
Laws 1911, ch. 191.	Laws 1901, p. 194.
HAWAII	PHILIPPINES
Laws 1907, Act 89.	War Dept. Annual Reports 1911, vol. IV, p. 89. (Acts Philippine Com'n 1911, No. 2081).
INDIANA	SOUTH CAROLINA
Laws 1918, ch. 68.	Acts 1914, Act 896, p. 668.
IOWA	VERMONT
Code Supp. 1907, tit. 15, p. 729.	Laws 1912, Act 99.
LOUISIANA	VIRGINIA
Laws 1904, Act 64.	Code 1904, ch. 133 A, § 2841 A.
MINNESOTA	WEST VIRGINIA
Laws 1918, ch. 272; Gen. St. 1918, p. 1291.	Acts 1907, ch. 81.

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THE NEGOTIABLE INSTRUMENTS LAW

Following the example of Great Britain, which in 1882 enacted the Bills of Exchange Act,¹ many of the states of the Union have enacted the so-called Negotiable Instruments Law. The English act was based upon the Digest of Judge Chalmers, and is for the most part a codification of the law relating to bills, notes, and checks. The history of the American act is as follows: In 1895 in many of the states were passed acts providing for the appointment of "Commissioners for the Promotion of Uniformity of Legislation in the United States"; and at a conference of commissioners from nineteen states, held in that year, was adopted a resolution requesting the committee on commercial laws to procure a draft of a bill relating to commercial paper, based on the English statute, and on such other sources of information as the committee might deem proper to consult. The committee appointed a sub-committee, which employed Mr. John J. Crawford, of New York City, to make a draft. Upon the completion of the draft by Mr. Crawford, it was revised by the sub-committee, and was then submitted to a conference of the commissioners, which included representatives of fourteen states; and, with certain amendments, was adopted by the commissioners. The final draft, with slight changes in some jurisdictions,² has already become law in forty-seven states, territories, and possessions of the United States. It has not been adopted in

¹ 45 & 46 Vict. c. 61. See introduction to Chalm. Dig. Bills Exch. (3d Ed.). The act is found in the Digest, and also in Rand. Com. Paper (2d Ed.) p. 2737, and in Huffcut, Neg. Inst. (1st Ed.) p. 87.

² These changes are indicated in Brannan, Anno. N. I. L. (2d Ed. 1911). A change not there indicated was made in N. I. L. § 96, when enacted in Kentucky, by the omission of the words "or merely oral" from the first line of that section.

California, Georgia, Maine, Mississippi, Texas, Porto Rico, and the Panama Canal Zone. The law is in the main declaratory in its effect, but makes a few changes, and necessarily changes the law in some jurisdictions on points concerning which a conflict of laws has existed.*

* See preface to the first edition of Crawford's Annotated Negotiable Instruments Law; Huffcut, Neg. Inst. (1st Ed.) pp. 117-127.

THE NEGOTIABLE INSTRUMENTS LAW

A General Act Relating to Negotiable Instruments (Being an Act to Establish a Law Uniform with the Laws of Other States on that Sub- ject)¹

TITLE I.—NEGOTIABLE INSTRUMENTS IN GENERAL

ARTICLE I.—FORM AND INTERPRETATION

Section 1.² Be it enacted, etc., An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;³
2. Must contain an unconditional promise or order to pay a sum certain in money;⁴
3. Must be payable on demand, or at a fixed or determinable future time;⁵
4. Must be payable to order or to bearer;⁶ and,

¹ Draft recommended by the Committee on Commercial Law of the Boards of Commissioners for promoting uniformity of legislation in the United States. For the changes in the draft which were made in some of the jurisdictions before its adoption, see Brannan, *Anno. N. I. L.* (2d Ed.).

The N. I. L. does not apply to instruments made and delivered prior to its passage. Section 193; *Dorsey v. Wellman*, 85 Neb. 262, 122 N. W. 989; *Mackintosh v. Gibbs*, 81 N. J. Law, 577, 80 Atl. 554, Ann. Cas. 1912D, 163; *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okl. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177; *Dunbar v. Commercial Electrical Supply Co.*, 32 Okl. 634, 123 Pac. 417, *semble*; *Gate City Nat. Bank v. Schmidt*, 168 Mo. App. 153, 152 S. W. 101, *semble*; *Fassler v. Streit*, 92 Neb. 786, 139 N. W. 628; *First Nat. Bank v. Bertoli* (Vt.) 89 Atl. 359.

² See p. 5, *supra*.

³ See p. 80, *supra*.

⁴ See pp. 36-38, 38-43, 61, 74, *supra*.

⁵ See p. 56, *supra*.

⁶ See pp. 21, 35, 83, *supra*.

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.⁷

Sec. 2. The sum payable is a sum certain within the meaning of this act,⁸ although it is to be paid—

1. With interest;⁹ or
2. By stated instalments;¹⁰ or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due;¹¹ or
4. With exchange, whether at a fixed rate or at the current rate;¹² or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.¹³

Sec. 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount;¹⁴ or
2. A statement of the transaction which gives rise to the instrument.¹⁵

But an order or promise to pay out of a particular fund is not unconditional.¹⁶

Sec. 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

1. At a fixed period after date or sight;¹⁷ or
2. On or before a fixed or determinable future time specified therein;¹⁸ or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.¹⁹

⁷ See p. 81, *supra*.

¹⁴ See p. 54, *supra*.

⁸ See p. 74, *supra*.

¹⁵ See p. 49, *supra*.

⁹ See p. 76, *supra*.

¹⁶ See p. 52, *supra*.

¹⁰ See pp. 57, 75, *supra*.

¹⁷ See p. 58, *supra*.

¹¹ See pp. 58, 75, *supra*.

¹⁸ See p. 51, *supra*.

¹² See p. 77, *supra*.

¹⁹ See p. 49, *supra*.

¹³ See pp. 72, 73, *supra*.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.²⁰

Sec. 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.²¹ But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity;²² or
2. Authorizes a confession of judgment if the instrument be not paid at maturity;²³ or
3. Waives the benefit of any law intended for the advantage or protection of the obligor;²⁴ or
4. Gives the holder an election to require something to be done in lieu of payment of money.²⁵

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Sec. 6.²⁶ The validity and negotiable character of an instrument are not affected by the fact that—

1. It is not dated;²⁷ or
2. Does not specify the value given, or that any value has been given therefor;²⁸ or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal;²⁹ or
5. Designates a particular kind of current money in which payment is to be made.³⁰

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Sec. 7.³¹ An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation;³² or

²⁰ See pp. 43, 45, supra.

²⁷ See p. 100, supra.

²¹ See p. 69, supra.

²⁸ See p. 103, supra.

²² See p. 71, supra.

²⁹ See pp. 5, 31, supra.

²³ See p. 71, supra.

³⁰ See p. 62, supra.

²⁴ See p. 71, supra.

³¹ See p. 497, supra.

²⁵ See p. 74, supra.

³² See pp. 57, 484, supra.

²⁶ See p. 370, supra.

2. In which no time for payment is expressed.³⁸

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.³⁹

Sec. 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order.⁴⁰ It may be drawn payable to the order of—

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker;⁴¹ or
3. The drawee;⁴² or
4. Two or more payees jointly;⁴³ or
5. One or some of several payees;⁴⁴ or
6. The holder of an office for the time being.⁴⁵

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.⁴⁶

Sec. 9. The instrument is payable to bearer—

1. When it is expressed to be so payable;⁴⁷ or
2. When it is payable to a person named therein or bearer;⁴⁸ or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;⁴⁹ or
4. When the name of the payee does not purport to be the name of any person;⁵⁰ or
5. When the only or last indorsement is an indorsement in blank.⁵¹

Sec. 10. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.⁵²

³⁸ See p. 57, *supra*.

³⁹ See pp. 57, 273, *supra*.

⁴⁰ See pp. 35, 83, *supra*.

⁴¹ See p. 86, *supra*.

⁴² See p. 86, *supra*.

⁴³ See p. 86, *supra*.

⁴⁴ See p. 86, *supra*.

⁴⁵ See p. 86, *supra*.

⁴⁶ See p. 85, *supra*.

⁴¹ See p. 84, *supra*.

⁴² See pp. 83, 87, *supra*.

⁴³ See p. 87, *supra*.

⁴⁴ See pp. 87-89, *supra*.

⁴⁵ See p. 87, *supra*.

⁴⁶ See pp. 154, 155, 158, 160,

161, 269, 485, *supra*.

⁴⁷ See p. 108, *supra*.

Sec. 11. Where the instrument or an acceptance or any endorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or endorsement as the case may be.⁴⁸

Sec. 12. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.⁴⁹

Sec. 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.⁵⁰

Sec. 14. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.⁵¹

Sec. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without au-

⁴⁸ See p. 101, *supra*.

⁴⁹ See pp. 100, 324, 576, *supra*.

⁵⁰ See pp. 100, 342, 348, *supra*.

⁵¹ See pp. 343, 345, 346, 349, 440, *supra*.

thority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.⁵²

Sec. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.⁵³

Sec. 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;⁵⁴
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;⁵⁵
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;⁵⁶

⁵² See pp. 347, 348, *supra*.

⁵³ See pp. 94-100, 181, 343, 347, 362, 485, *supra*.

⁵⁴ See p. 108, *supra*.

⁵⁵ See p. 100, *supra*.

⁵⁶ See p. 100, *supra*.

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;
7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.⁵⁷

Sec. 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.⁵⁸

Sec. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.⁵⁹

Sec. 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.⁶⁰

Sec. 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.⁶¹

Sec. 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein,

⁵⁷ See p. 80, *supra*.

⁶⁰ See pp. 92-94, *supra*.

⁵⁸ See pp. 80, 120, 178, *supra*.

⁶¹ See p. 440, *supra*.

⁵⁹ See p. 92, *supra*.

notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.⁶²

Sec. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.⁶³

ARTICLE II.—CONSIDERATION

Sec. 24. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.⁶⁴

Sec. 25. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.⁶⁵

Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.⁶⁶

Sec. 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.⁶⁷

Sec. 28. Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.⁶⁸

⁶² See pp. 90, 286-288, 293, *supra*.

⁶³ See p. 334, *supra*.

⁶⁴ See pp. 103, 268, 370, *supra*.

⁶⁵ See pp. 365, 417, 422, 424, *supra*.

⁶⁶ See pp. 455, 463, *supra*.

⁶⁷ See pp. 420, 424, 428, *supra*.

⁶⁸ See pp. 104, 257, 271, 373, 378, 379, *supra*.

Sec. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.⁶⁹

ARTICLE III.—NEGOTIATION

Sec. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.⁷⁰

Sec. 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.⁷¹

Sec. 32. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.⁷²

Sec. 33. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.⁷³

Sec. 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies

⁶⁹ See pp. 204, 235, 236, 292, 455, *supra*.

⁷⁰ See pp. 158, 160, 175, 263, 264, 266, 269, 278, 593, *supra*.

⁷¹ See pp. 80, 151, 266, *supra*.

⁷² See pp. 157, 178, *supra*.

⁷³ See p. 162, *supra*.

no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.⁷⁴

Sec. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.⁷⁵

Sec. 36.⁷⁶ An indorsement is restrictive, which either—

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.⁷⁷

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Sec. 37.⁷⁸ A restrictive indorsement confers upon the indorsee the right—

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;⁷⁹
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Sec. 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.⁸⁰

Sec. 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom

⁷⁴ See pp. 154, 155, 160, 161, 269, 347, *supra*.

⁷⁵ See pp. 154, 158-158, *supra*.

⁷⁶ See pp. 160, 168, 231, 264, 439, *supra*.

⁷⁷ See p. 415, *supra*.

⁷⁸ See pp. 169, 172, 415, 439, *supra*.

⁷⁹ See p. 280, *supra*.

⁸⁰ See pp. 162, 164, 165, *supra*.

an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.⁸¹

Sec. 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.⁸²

Sec. 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.⁸³

Sec. 42. Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.⁸⁴

Sec. 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.⁸⁵

Sec. 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.⁸⁶

Sec. 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.⁸⁷

Sec. 46. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.⁸⁸

Sec. 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.⁸⁹

⁸¹ See pp. 165, 168, *supra*.

⁸² See pp. 154, 155, 161, 162, *supra*.

⁸³ See pp. 176, 178, 265, *supra*.

⁸⁴ See pp. 85, 94, 178, *supra*.

⁸⁵ See pp. 120, 127, 178, *supra*.

⁸⁶ See p. 92, *supra*.

⁸⁷ See p. 463, *supra*.

⁸⁸ See p. 287, *supra*.

⁸⁹ See pp. 160, 271, 392,

442, *supra*.

Sec. 48. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.⁹⁰

Sec. 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.⁹¹

Sec. 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.⁹²

ARTICLE IV.—RIGHTS OF THE HOLDER

Sec. 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.⁹³

Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;⁹⁴
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;⁹⁵
3. That he took it in good faith and for value;⁹⁶
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.⁹⁷

⁹⁰ See p. 158, *supra*.

⁹¹ See pp. 179, 259, 266, 267, 414, *supra*.

⁹² See p. 180, *supra*.

⁹³ See pp. 263, 277, 278, 315, 398, *supra*.

⁹⁴ See pp. 436, 440, *supra*.

⁹⁵ See pp. 271, 272, 440-442, *supra*.

⁹⁶ See p. 444, *supra*.

⁹⁷ See pp. 158, 324, 345, 346, 416, 434, 441, 442, 451, 576, *supra*.

Sec. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.⁸⁸

Sec. 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.⁸⁹

Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.¹

Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.²

Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereon against all parties liable thereon.³

Sec. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.⁴

Sec. 59. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any per-

⁸⁸ See pp. 442, 443, 499, *supra*.

⁸⁹ See pp. 418, 453, *supra*.

¹ See pp. 271, 304, 305, 315, 356, 357, 359, 364, 379, 398, *supra*.

² See pp. 379, 432-436, *supra*.

³ See pp. 258, 263, 304, 305, 357, 379, 429, *supra*.

⁴ See pp. 257, 258, 271, 274, 275, 454, 455, *supra*.

son who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.⁵

ARTICLE V.—LIABILITIES OF PARTIES

Sec. 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.⁶

Sec. 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.⁷

Sec. 62.⁸ The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

Sec. 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.⁹

⁵ See pp. 461, 463, 464, 467, supra.

⁶ See pp. 194, 208, 287, 293, supra.

⁷ See pp. 211, 287, 293, supra.

⁸ See pp. 194, 197, 199, 200, 201, 203, 206, 341, supra.

⁹ See pp. 183-183, supra.

Sec. 64.¹⁰ Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.¹¹
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Sec. 65.¹² Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

Sec. 66.¹³ Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may

¹⁰ See pp. 183-193, 287, 293, 324, supra.

¹¹ See p. 324, supra.

¹² See pp. 5, 200, 225, 226, 287, 293, 500, supra.

¹³ See pp. 200, 211, 218, 219, 222, supra.

be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.¹⁴

Sec. 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Sec. 68. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.¹⁵

Sec. 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.¹⁶

ARTICLE VI.—PRESENTMENT FOR PAYMENT

Sec. 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.¹⁷

Sec. 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.¹⁸

¹⁴ See pp. 160, 175, *supra*.

¹⁵ See pp. 537, 541, *supra*.

¹⁶ See p. 228, *supra*.

¹⁷ See pp. 57, 194, 195, 474, 494, 495, 500, 560, *supra*.

¹⁸ See pp. 273, 497, 499, 500, 501, 505, 512, *supra*.

Sec. 72.¹⁰ Presentment for payment, to be sufficient, must be made—

1. By the holder, or by some person authorized to receive payment on his behalf;¹¹
2. At a reasonable hour on a business day;¹²
3. At a proper place as herein defined;¹³
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.¹⁴

Sec. 73.¹⁵ Presentment for payment is made at the proper place—

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.¹⁶
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.¹⁷

Sec. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.¹⁸

Sec. 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.¹⁹

Sec. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, present-

¹⁰ See pp. 487, 495, 515, 518, *supra*.

¹¹ See pp. 485, 486, *supra*.

¹² See p. 515, *supra*.

¹³ See p. 478, *supra*.

¹⁴ See pp. 478, 487-489, *supra*.

¹⁵ See pp. 487, 495, 518, *supra*.

¹⁶ See p. 491, *supra*.

¹⁷ See pp. 488, 491, 492, *supra*.

¹⁸ See pp. 474, 478, *supra*.

¹⁹ See pp. 515, 516, *supra*.

ment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be found.²⁹

Sec. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.³⁰

Sec. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.³¹

Sec. 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.³²

Sec. 80. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.³³

Sec. 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.³⁴

Sec. 82.³⁵ Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;³⁶
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

Sec. 83.³⁷ The instrument is dishonored by non-payment when,—

1. It is duly presented for payment and payment is refused or cannot be obtained; or

²⁹ See p. 488, *supra*.

³⁵ See pp. 487-489, 495, 500.

³⁰ See p. 488, *supra*.

³⁶ 560, 564, *supra*.

³¹ See p. 488, *supra*.

³⁷ See pp. 478, 488, 489, 552,

³² See p. 561, *supra*.

supra.

³³ See pp. 245, 561, 562, *supra*.

³⁸ See p. 553, *supra*.

³⁴ See pp. 315, 499, 500, 552, *supra*.

2. Presentment is excused and the instrument is overdue and unpaid.

Sec. 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

Sec. 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.⁸⁸

Sec. 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Sec. 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Sec. 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.⁸⁹

ARTICLE VII.—NOTICE OF DISHONOR

Sec. 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.⁹⁰

Sec. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who

⁸⁸ See pp. 104, 106, 107, 515, *supra*.

⁸⁹ See pp. 357, 398, 590, *supra*.

⁹⁰ See pp. 537, 553, 577, 578, 581, 582, *supra*.

might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.⁴¹

Sec. 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Sec. 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties, who have a right of recourse against the party to whom it is given.⁴²

Sec. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.⁴³

Sec. 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.⁴⁴

Sec. 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.⁴⁵

Sec. 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.⁴⁶

Sec. 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.⁴⁷

Sec. 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a per-

⁴¹ See pp. 536, 537, *supra*.

⁴³ See p. 538, *supra*.

⁴² See p. 538, *supra*.

⁴⁴ See p. 540, *supra*.

⁴⁵ See pp. 531, 542, 543, *supra*.

⁴⁶ See pp. 315, 522, 530-532, 535, 542, 543, 545, 547, *supra*.

⁴⁷ See p. 540, *supra*.

sonal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.⁴⁸

Sec. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.⁴⁹

Sec. 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.⁵⁰

Sec. 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.⁵¹

Sec. 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.⁵²

Sec. 103.⁵³ Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.⁵⁴
2. If given at his residence, it must be given before the usual hours of rest on the day following.⁵⁵
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Sec. 104.⁵⁶ Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.⁵⁷

⁴⁸ See pp. 540, 541, *supra*.

⁴⁹ See p. 541, *supra*.

⁵⁰ See p. 541, *supra*.

⁵¹ See p. 541, *supra*.

⁵² See p. 549, *supra*.

⁵³ See p. 546, *supra*.

⁵⁴ See p. 550, *supra*.

⁵⁵ See p. 550, *supra*.

⁵⁶ See p. 546, *supra*.

⁵⁷ See p. 550, *supra*.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.⁵⁸

Sec. 105. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.⁵⁹

Sec. 106. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.⁶⁰

Sec. 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.⁶¹

Sec. 108.⁶² Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters;⁶³ or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Sec. 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Sec. 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

⁵⁸ See p. 551, *supra*.

⁶¹ See pp. 537, 551, *supra*.

⁵⁹ See pp. 545, 547, *supra*.

⁶² See p. 548, *supra*.

⁶⁰ See p. 547, *supra*.

⁶³ See p. 557, *supra*.

Sec. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.⁶⁴

Sec. 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.⁶⁵

Sec. 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.⁶⁶

Sec. 114.⁶⁷ Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;⁶⁸
2. When the drawee is a fictitious person or a person not having capacity to contract;
3. When the drawer is the person to whom the instrument is presented for payment;⁶⁹
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;⁷⁰
5. Where the drawer has countermanded payment.⁷¹

Sec. 115.⁷² Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;⁷³
2. Where the indorser is the person to whom the instrument is presented for payment;⁷⁴
3. Where the instrument was made or accepted for his accommodation.

⁶⁴ See pp. 517, 523, 551, 573, *supra*.

⁶⁵ See p. 552, *supra*.

⁷⁰ See pp. 561, 562, *supra*.

⁶⁶ See pp. 552, 560, *supra*.

⁷¹ See p. 561, *supra*.

⁶⁷ See p. 560, *supra*.

⁷² See pp. 245, 561, 562, 564, *supra*.

⁶⁸ See p. 564, *supra*.

⁷³ See p. 564, *supra*.

⁶⁹ See p. 564, *supra*.

⁷⁴ See p. 564, *supra*.

Sec. 116. Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Sec. 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Sec. 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.⁷⁵

ARTICLE VIII.—DISCHARGE OF NEGOTIABLE INSTRUMENTS

Sec. 119.⁷⁶ A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;⁷⁷
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;⁷⁸
3. By the intentional cancellation thereof by the holder;⁷⁹
4. By any other act which will discharge a simple contract for the payment of money;⁸⁰
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.⁸¹

Sec. 120. A person secondarily liable on the instrument is discharged:⁸²

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;⁸³
4. By a valid tender of payment made by a prior party;

⁷⁵ See p. 528, *supra*.

⁷⁶ See pp. 245, 357, 393, 394, 407, *supra*.

⁷⁷ See p. 398, *supra*.

⁷⁸ See p. 395, *supra*.

⁷⁹ See p. 405, *supra*.

⁸⁰ See pp. 396, 405, 407, *supra*.

⁸¹ See p. 395, *supra*.

⁸² See p. 407, *supra*.

⁸³ See pp. 406, 409, *supra*.

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;⁸⁴
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.⁸⁵

Sec. 121.⁸⁶ Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Sec. 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.⁸⁷

Sec. 123. A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.⁸⁸

Sec. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided,

⁸⁴ See p. 408, *supra*.

⁸⁷ See pp. 403, 404, *supra*.

⁸⁵ See pp. 410, 412, *supra*.

⁸⁸ See p. 404, *supra*.

⁸⁶ See pp. 245, 399, *supra*.

except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.⁸⁹

Sec. 125.⁹⁰ Any alteration which changes:

1. The date;⁹¹
2. The sum payable, either for principal or interest;⁹²
3. The time or place of payment;⁹³
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

TITLE II.—BILLS OF EXCHANGE

ARTICLE I.—FORM AND INTERPRETATION

Sec. 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.⁹⁴

Sec. 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Sec. 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.⁹⁵

⁸⁹ See pp. 109, 318, 319, 322, 324, 441, supra.

⁹⁰ See pp. 323, 329, 393, supra. ⁹¹ See p. 325, supra.

⁹¹ See pp. 101, 325, supra.

⁹² See p. 29, supra.

⁹² See p. 327, supra.

⁹³ See p. 81, supra.

Sec. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.⁹⁶

Sec. 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.⁹⁷

Sec. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE II.—ACCEPTANCE

Sec. 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.⁹⁸

Sec. 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.⁹⁹

Sec. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.¹

Sec. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor

⁹⁶ See pp. 31, 33, 101, *supra*.

⁹⁷ See pp. 83, 86, 503, *supra*.

⁹⁸ See pp. 61, 80, 116, 117, 121, 125, 131, 137, 595, *supra*.

⁹⁹ See pp. 131, 133, 137, *supra*.

¹ See pp. 131, 137, 139, *supra*.

of every person who, upon the faith thereof, receives the bill for value.²

Sec. 136. The drawee is allowed twenty-four hours after presentation, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.³

Sec. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.⁴

Sec. 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.⁵

Sec. 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.⁶

Sec. 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.⁷

Sec. 141.⁸ An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;

² See p. 140, *supra*.

⁶ See pp. 123, 124, *supra*.

³ See p. 147, *supra*.

⁷ See p. 124, *supra*.

⁴ See pp. 136, 137, 597, *supra*.

⁸ See p. 124, *supra*.

⁵ See pp. 120, 128, 147, *supra*.

5. The acceptance of some one or more of the drawees, but not of all.

Sec. 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.⁹

ARTICLE III.—PRESENTMENT FOR ACCEPTANCE

Sec. 143.¹⁰ Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Sec. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.¹¹

Sec. 145.¹² Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them

⁹ See pp. 124, 125, *supra*.

¹¹ See pp. 484, 496, 499, 500, *supra*.

¹⁰ See pp. 481, 482, 484, *supra*.

¹² See pp. 484, 515, *supra*.

all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;¹³

2. Where the drawee is dead, presentment may be made to his personal representative;¹⁴
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Sec. 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

Sec. 147. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.¹⁵

Sec. 148. Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.¹⁶
2. Where, after the exercise of reasonable diligence, presentment cannot be made.
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.¹⁷

Sec. 149. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

¹³ See p. 487, *supra*.

¹⁴ See pp. 487, 564, *supra*.

¹⁴ See p. 487, *supra*.

¹⁷ See p. 484, *supra*.

¹⁵ See p. 552, *supra*.

2. When presentment for acceptance is excused, and the bill is not accepted.

Sec. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Sec. 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.¹⁸

ARTICLE IV.¹⁹—PROTEST

Sec. 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.²⁰

Sec. 153.²¹ The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify—

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Sec. 154.²² Protest may be made by—

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

¹⁸ See p. 483, *supra*.

²¹ See pp. 523, 525, 526, *supra*.

¹⁹ See pp. 517, 528, *supra*.

²² See pp. 523, 524, *supra*.

²⁰ See pp. 31-33, 101, 520, 522, *supra*.

Sec. 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.²³

Sec. 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.²⁴

Sec. 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.²⁵

Sec. 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.²⁶

Sec. 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.²⁷

ARTICLE V.²⁸—ACCEPTANCE FOR HONOR

Sec. 161. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue; any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable

²³ See p. 522, *supra*.

²⁶ See pp. 469, 525, 551, *supra*.

²⁴ See p. 527, *supra*.

²⁷ See pp. 476, 525, *supra*.

²⁵ See p. 518, *supra*.

²⁸ See pp. 145, 146, *supra*.

thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Sec. 162. An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Sec. 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Sec. 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 165. The acceptor for honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.²⁰

Sec. 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Sec. 167. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Sec. 168. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forward-

²⁰ See p. 198, *supra*.

ed within the time specified in section one hundred and four.

Sec. 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE VI.—PAYMENT FOR HONOR

Sec. 171. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.³⁰

Sec. 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.³¹

Sec. 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.³²

Sec. 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.³³

Sec. 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.³⁴

Sec. 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.³⁵

³⁰ See p. 403, *supra*.

³³ See p. 403, *supra*.

³¹ See p. 403, *supra*.

³⁴ See p. 403, *supra*.

³² See p. 403, *supra*.

³⁵ See p. 403, *supra*.

Sec. 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.³⁶

ARTICLE VII.—BILLS IN A SET

Sec. 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.³⁷

Sec. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.³⁸

Sec. 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.³⁹

Sec. 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.⁴⁰

Sec. 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.⁴¹

Sec. 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.⁴²

³⁶ See p. 403, *supra*.

⁴⁰ See p. 33, *supra*.

³⁷ See pp. 33, 395, *supra*.

⁴¹ See p. 34, *supra*.

³⁸ See p. 34, *supra*.

⁴² See pp. 33, 395, *supra*.

³⁹ See p. 33, *supra*.

TITLE III.—PROMISSORY NOTES AND CHECKS

ARTICLE I

Sec. 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.⁴³

Sec. 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.⁴⁴

Sec. 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.⁴⁵

Sec. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.⁴⁶

Sec. 188. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.⁴⁷

Sec. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.⁴⁸

⁴³ See pp. 34, 370, *supra*.

⁴⁴ See pp. 86, 118, 143, 503, 574, 577, 578, 581, *supra*.

⁴⁵ See pp. 498, 500, 503, 577, 578, 580, 581, *supra*.

⁴⁶ See pp. 589, 591, *supra*.

⁴⁷ See pp. 503, 592, 593, *supra*.

⁴⁸ See pp. 584, 585, *supra*.

TITLE IV.—GENERAL PROVISIONS**ARTICLE I**

Sec. 190. This act shall be known as the Negotiable Instruments Law.⁴⁹

Sec. 191.⁵⁰ In this act, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.⁵¹

“Action” includes counterclaim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.⁵²

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.⁵³

Sec. 192. The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are “secondarily” liable.

⁴⁹ See p. 305, *supra*.

⁵⁰ See pp. 5, 278, 414, 483, 486, 497, 593, *supra*.

⁵¹ See pp. 117, 128, 129, *supra*.

⁵² See p. 263, *supra*.

⁵³ See p. 80, *supra*.

Sec. 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.⁵⁴

Sec. 194. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Sec. 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Sec. 196. In any case not provided for in this act the rules of the law merchant shall govern.⁵⁵

Sec. 197. Of the laws enumerated in the schedules hereto annexed that portion specified in the last column is repealed.

Sec. 198. This chapter shall take effect on

⁵⁴ See pp. 442, 500, 504, 505, 509, 510, supra.

⁵⁵ See p. 408, supra.

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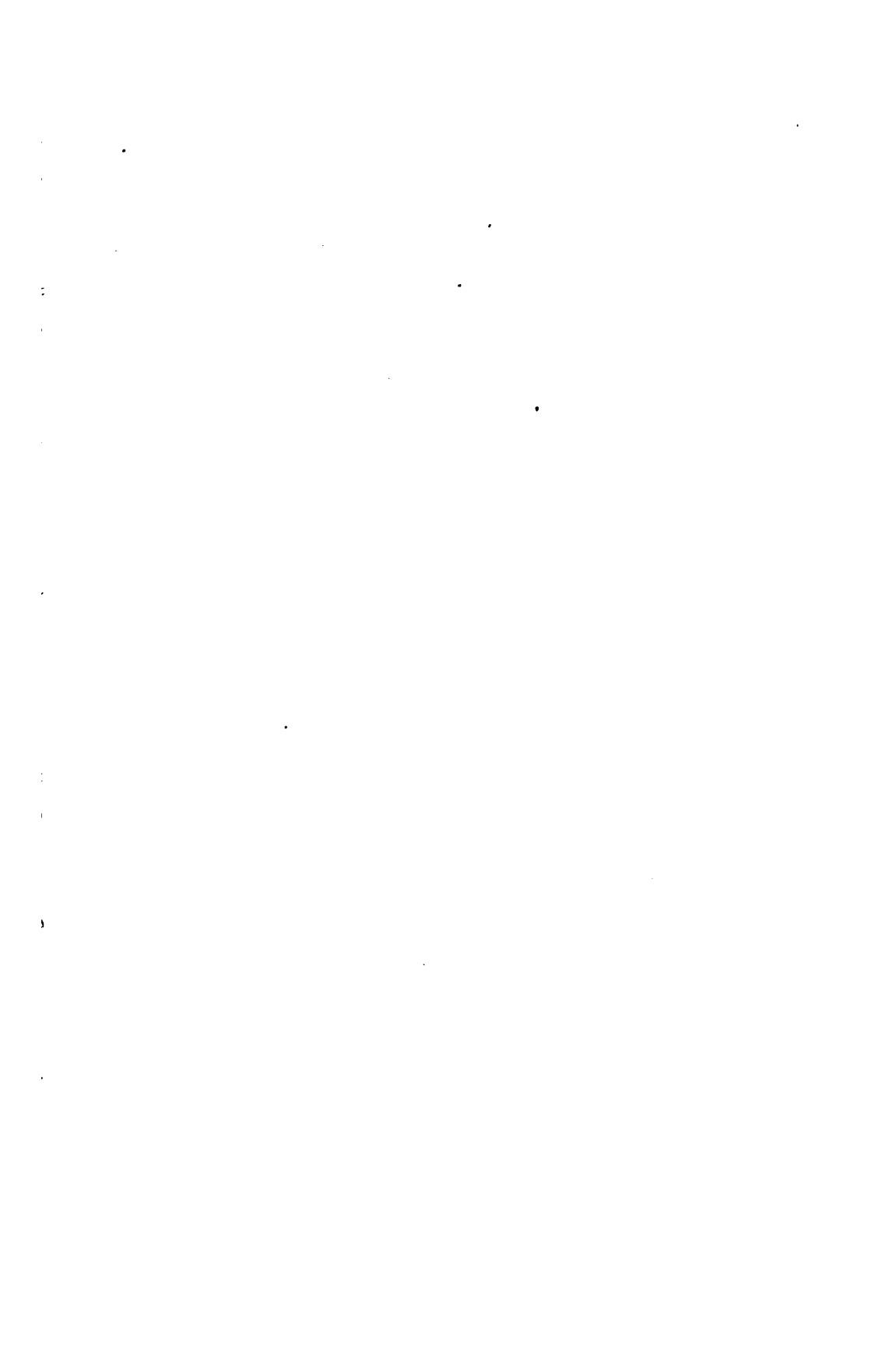
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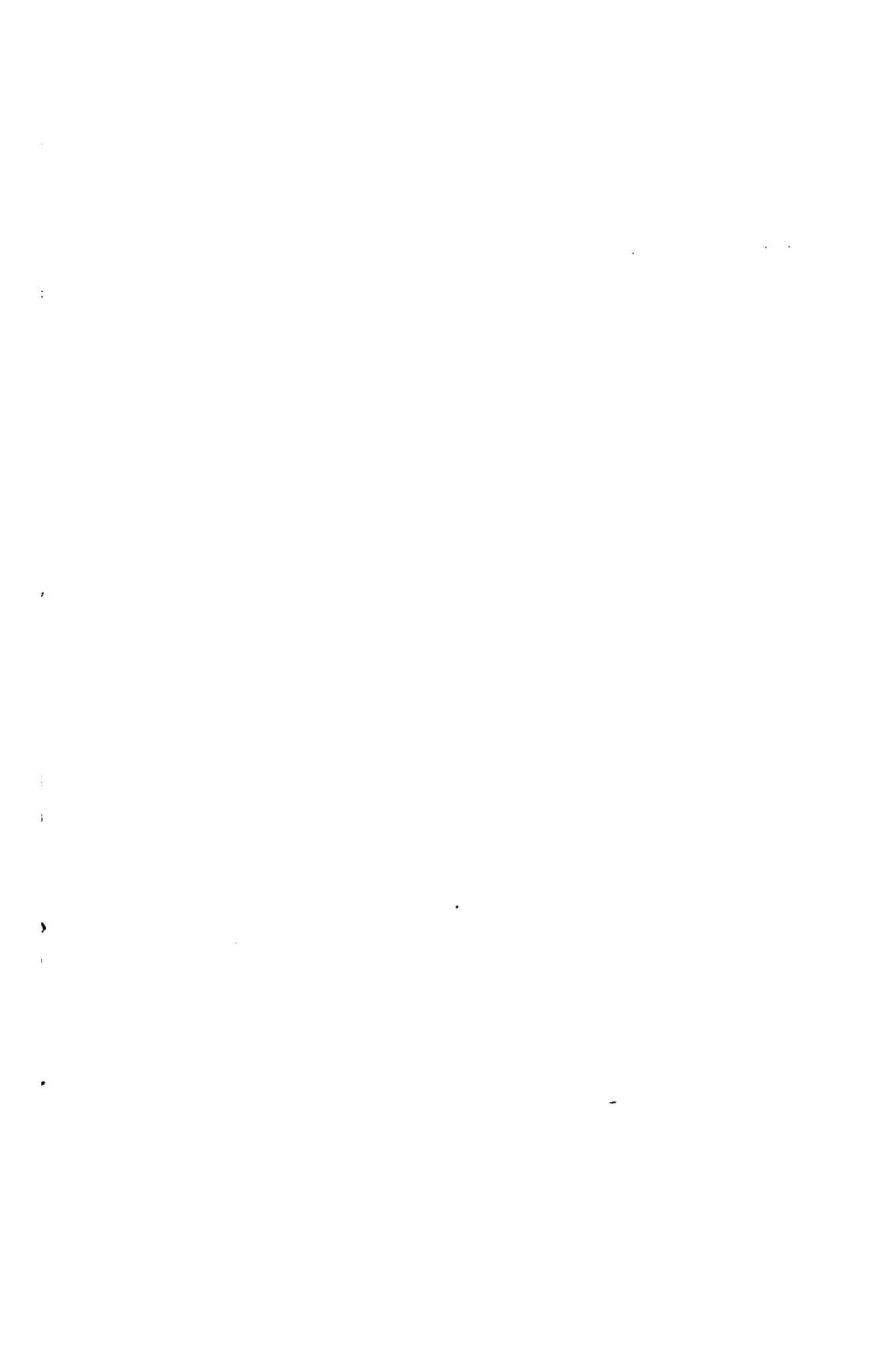
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- 8. The Corporation and the State.**
- 9. Dissolution of Corporations.**
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- 11. Membership in Corporations.**
- 12. Membership in Corporations.**
- 13. Management of Corporations—Officers and Agents.**
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6. Parties Concerned.
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8. Offenses against the Person.
9. Offenses against the Person.
10. Offenses against the Habitation.
11. Offenses against Property.
12. Offenses against the Public Health, Morals, etc.
13. Offenses against Public Justice and Authority.
14. Offenses against the Public Peace.
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- 11. Streets, Sewers, Parks, and Public Buildings.**
- 12. Torts.**
- 13. Debts, Funds, Expenses, and Administration.**
- 14. Taxation.**
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7. The Relation Between Mineral Lands and Townsites.
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9. Definitions of Mining Law Terms.
10. The Discovery of Lode and Placer Claims.
11. Who May and Who May not Locate Mining Claims.
12. The Location of Lode Claims.
13. The Location of Mill Sites.
14. The Location of Tunnel Sites and of Blind Lodes Cut by Tunnels.
15. The Location of Placers and of Lodes within Placers.
16. The Annual Labor or Improvements Requirements.
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21. Subsurface Rights.
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23. Oil and Gas Leases.
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3. Place and Time of Appointment and Requisites Therefor.
4. Who may Claim Appointment as Executor.
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6. Disqualifications for the Office of Executor or Administrator.
7. Acceptance or Renunciation.
8. Proceedings for Appointment of Executors and Administrators.
9. Special Kinds of Administrations.
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15. Management of the Estate.
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4. Bailments for the Bailee's Sole Benefit.
5. Bailments for Mutual Benefit—Hired Use of Things.
6. Bailments for Mutual Benefit—Hired Services about Things.
7. Bailments for Mutual Benefit—Pledges.
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9. Private and Common Carriers of Goods.
10. Liabilities of the Common Carrier of Goods.
11. Liability under Special Contract.
12. Commencement and Termination of the Liability of the Common Carrier of Goods.
13. The Rights of the Common Carrier of Goods.
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15. Actions against Carriers of Goods.
16. The Nature of the Relation.
17. Commencement and Termination of the Relation.
18. Liabilities of the Common Carrier of Passengers.
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- Accident.
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6. Restraint upon Power of Testamentary Disposition—Who may be Beneficiaries—What may be Disposed of by Will.
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5. Powers of Partners.
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7. Remedies of Creditors.
8. Actions Between Partners.
9. Actions Between Partners and Third Persons.
10. Termination of the Partnership.
11. Limited Partnerships.

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8. Pleading and Practice.
9. Breach of Contracts for Sale of Goods.
10. Damages in Actions against Carrier.
11. Damages in Actions against Telegraph Companies.
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8. Estates as to Quality on Condition—on Limitation.
9. Estates as to Quality—Mortgages.
10. Equitable Estates.
11. Estates as to Time of Enjoyment—Future Estates.
12. Estates as to Number of Owners—Joint Estates.
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- The Right of Action in Admiralty for Injuries Resulting Fatally.
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- Rules as to Narrow Channels, Special Circumstances, and General Precautions.
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- Vessel Ownership Independent of the Limited Liability Act.
- Rights and Liabilities of Owners as Affected by the Limited Liability Act.
- The Relative Priorities of Maritime Claims.
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APPENDIX.

1. The Mariner's Compass.
2. Statutes Regulating Navigation, Including:
 - (1) The International Rules.
 - (2) The Rules for Coast and Connecting Inland Waters.
 - (3) The Dividing Lines between the High Seas and Coast Waters.
 - (4) The Lake Rules.
 - (5) The Mississippi Valley Rules.
 - (6) The Act of March 3, 1899, as to Obstructing Channels.
3. The Limited Liability Acts, Including:
 - (1) The Act of March 3, 1851, as Amended.
 - (2) The Act of June 26, 1884.
4. Section 941, Rev. St., as Amended, Regulating Bonding of Vessels.
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10. Same—Jurisdiction to Issue Certain Extraordinary Writs.
11. Same—Original Jurisdiction Over Ordinary Controversies.
12. Same—Continued.
13. Same—Continued.
14. Same—Jurisdiction by Removal.
15. Same—Continued.
16. Same—Continued.
17. Other Courts Vested with Original Jurisdiction.
18. Procedure in the Ordinary Federal Courts of Original Jurisdiction—Courts of Law.
19. Same—Courts of Equity.
20. Same—Continued.
21. Appellate Jurisdiction—The Circuit Court of Appeals.
22. Same—The Supreme Court.
23. Procedure on Error and Appeal.

The United States Supreme Court Rules, the Rules for Practice for the Courts of Equity of the United States promulgated Nov. 4, 1912, the Judicial Code, and the portion of the Deficiency Appropriation Bill of October 22, 1913, abolishing the Commerce Court, are given in an Appendix.

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9. Malicious Wrongs.
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8. Purchaser for Value without Notice.
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9. Certainty in Pleading.
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11. Directness and Brevity in Pleading.
12. Miscellaneous Rules.
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- 3. Proceedings in an Equitable Suit.**
- 4. Bills in Equity.**
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5. Delegation by Agent—Subagents.
6. Termination of the Relation.
7. Construction of Authority.

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8. Liability of Principal to Third Person—Contract.
9. Same (continued).
10. Admissions by Agent—Notice to Agent.
11. Liability of Principal to Third Person—Torts and Crimes.
12. Liability of Third Person to Principal.

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13. Liability of Agent to Third Person (including parties to contracts).
14. Liability of Third Person to Agent.

Part 4.—RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

15. Duties of Agent to Principal.
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9. Banking Corporations.
10. Representation of Bank by Officers.
11. Insolvency.
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11. Guardians Defined—Selection and Appointment.
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13. Termination of Guardianship—Enforcing Guardian's Liability.

Part 4.—INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

14. Infants.
15. Persons Non Compotes' Mentis and Aliens.

Part 5.—MASTER AND SERVANT.

16. Creation and Termination of Relation.

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4. Effect of the Contract in Passing the Property—Sale of Goods not Specific.
5. Fraud, and Retention of Possession.
6. Illegality.
7. Conditions and Warranties.
8. Performance.
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Agents and their Powers.
Waiver and Estoppel.
The Standard Fire Policy.
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Marine Insurance.
Accident Insurance.
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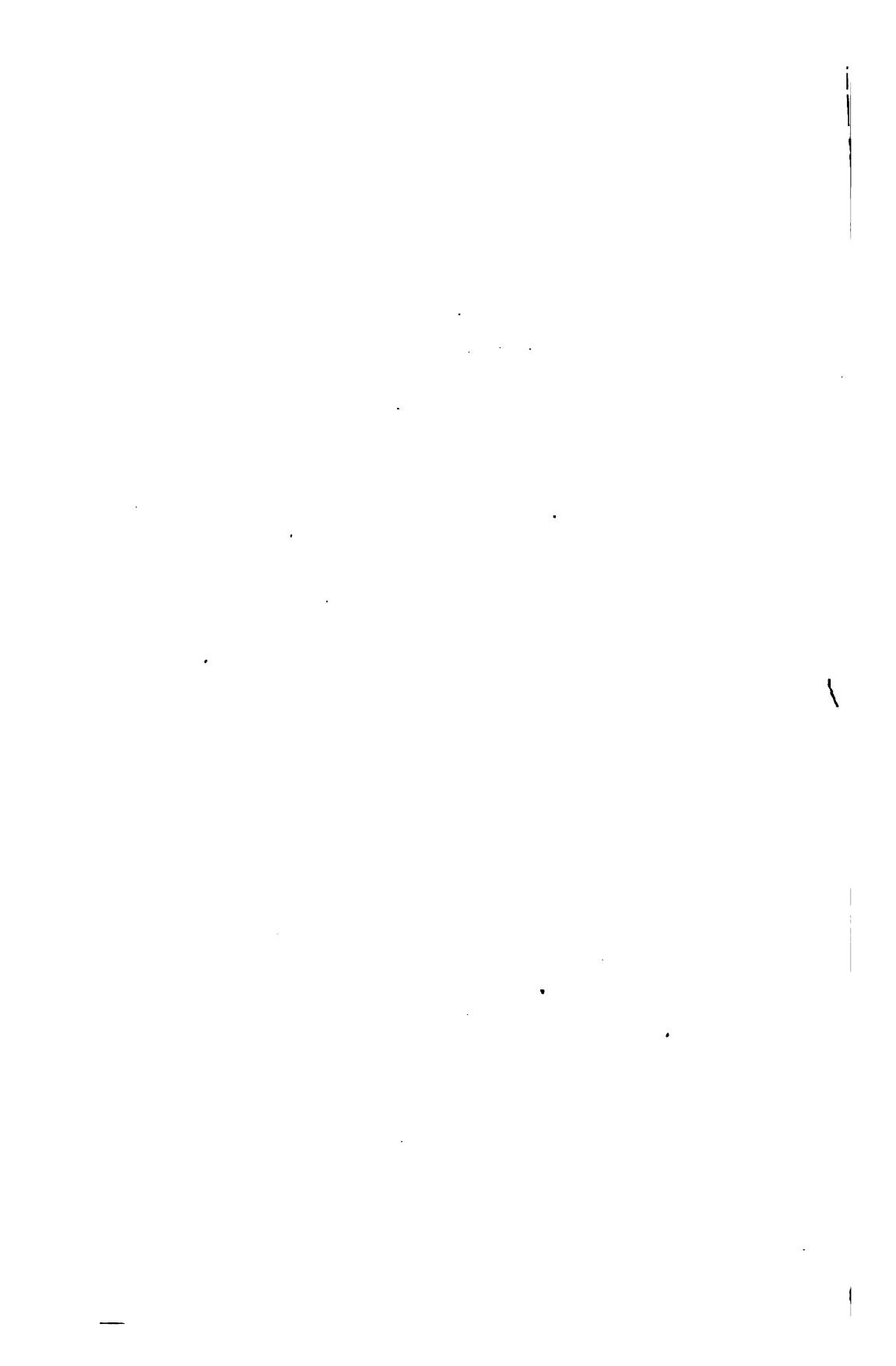
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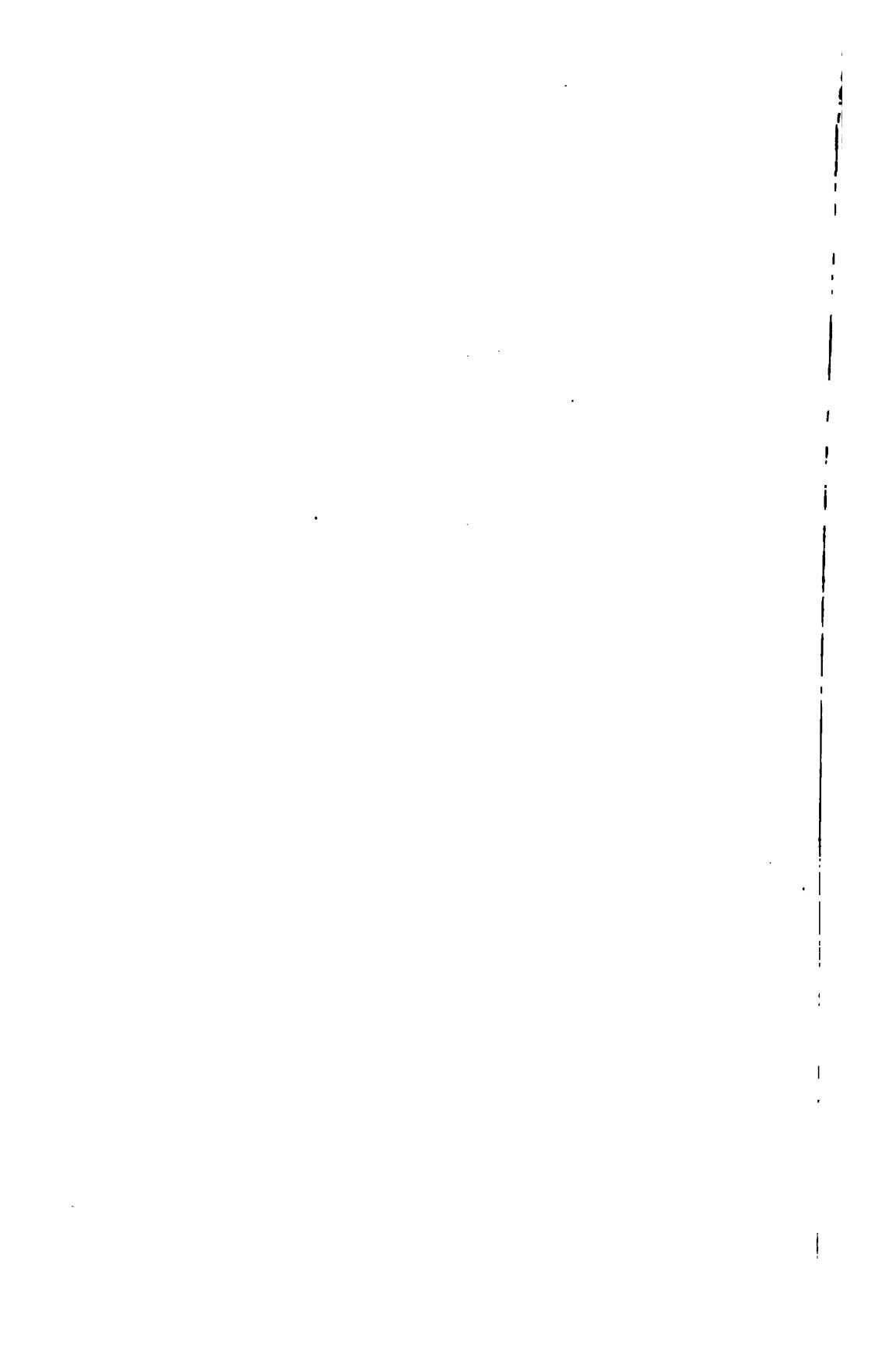
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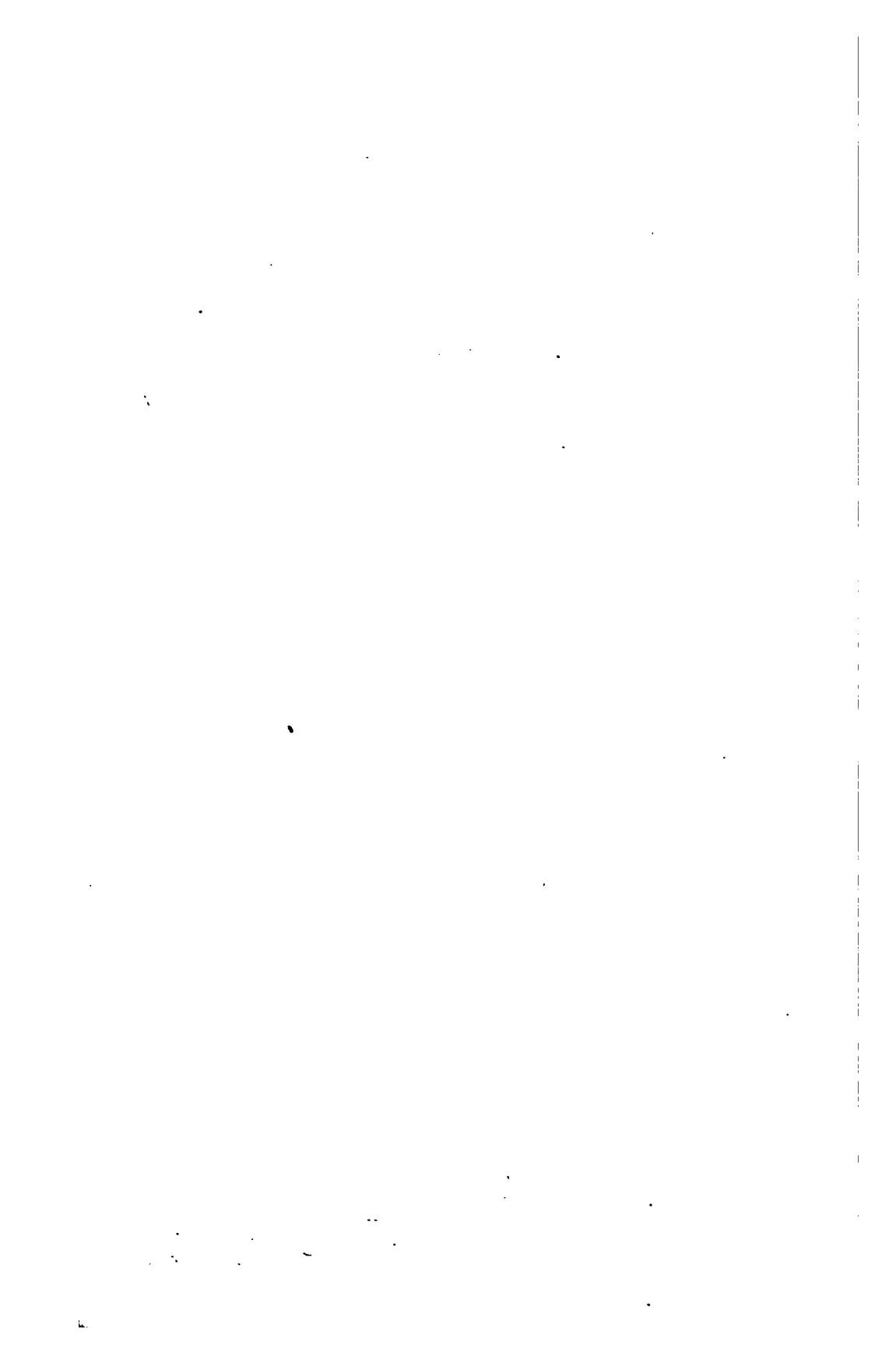
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